CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 31

JAMES KARL MUSCHANY AND VERA MUSCHANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 32

WILLIAM M. ANDREWS AND BERTHA L. ANDREWS, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONS FOR CERTIORARI FILED {FEBRUARY 17, 1944. FEBRUARY 24, 1944.

CERTIORARI GRANTED APRIL 3, 1944.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,561

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

JAMES KARL MUSCHANY AND VERA MUSCHANY,
APPELLEES.

No. 12,562

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

WILLIAM M. ANDREWS AND BERTHA L. ANDREWS,
APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 10, 1943.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the November Term, 1943, of said Court, before the Honorable Joseph W. Woodrough, the Honorable Seth Thomas and the Honorable Harvey M. Johnsen, Circuit Judges.

Attest: E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 10th day of March, A. D., 1943, a transcript of record pursuant to appeals taken from the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the United States of America was Appellant and James Karl Muschany and Vera Muschany were Appellees, and wherein the United States of America was Appellant and William M. Andrews and Bertha L. Andrews were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 2] In the United States District Court, Eastern District of Missouri, Eastern Division,

United States of America, Plaintiff,
Docket No. 807. vs. At Law. Tract No. 24/233
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

Notice of Appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

(Filed December 18, 1942.)

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 12th day of October, 1942; and from the Order of the Court overruling the plaintiff's motion for a new trial entered on the 21st day of September, 1942.

UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney,
402 New Federal Building,
St. Louis, Missouri.

[fol. 3] In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Notice of Appeal to the United States Circuit Court of Appeals for the Eighth Circuit.

(Filed December 18, 1942.)

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court

of Appeals for the Eighth Circuit from the final judgment entered in this action on the 5th day of November, 1942; and from the Order of the Court overruling the plaintiff's motion for a new trial entered on the 10th day of November, 1942.

UNITED STATES OF AMERICA,
By Harry C. Blanton,
United States Attorney,
402 New Federal Building,
St. Louis, Missouri.

[fol. 4] (Docket entry showing filing of notice of appeal.)

(December 18, 1942.)

(Cause No. 807)

Notice of appeal to the United States Circuit Court of Appeals, 8th Circuit, of the United States of America, plaintiff herein, from the final judgment entered in this cause October 12, 1942 and from the order entered September 21, 1942 overruling plaintiff's motion for a new trial, filed.

(Docket entry showing mailing of notice to parties in interest of appeal of plaintiff.)

(December 21, 1942)

Certificate of Clerk as to mailing of notice to parties in interest of appeal of plaintiff from final judgment entered October 12, 1942, filed.

(Docket entry showing filing of notice of appeal.)

(December 18, 1942.)

(Cause No. 874)

Notice of appeal to the United States Circuit Court of Appeals, 8th Circuit, of the United States of America, plaintiff herein, from the final judgment entered in this cause November 5, 1942 and from the order entered November 10, 1942 overruling plaintiff's motion for a new trial, filed.

(Docket entry showing mailing of notice to parties in interest of appeal of plaintiff)

(December 21, 1942)

Certificate of Clerk as to mailing of notice to parties in interest of appeal of plaintiff from final judgment entered November 5, 1942, filed.

[fol. 5] (Stipulation as to Preparation of Joint Transcript of Record, etc.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 807. vs. At Law. Tract No. 24/233
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Stipulation.

(Filed February 17, 1943)

It is stipulated and agreed by and between the parties hereto that a joint transcript of the record in the above entitled causes may be filed; and that testimony produced before the Honorable Charles B. Davis and the Honorable George H. Moore in the above entitled causes, and before the Honorable John C. Collet, sitting in cause No. 765, entitled United States of America, plaintiff, vs. 94.68 acres of land, more or less, situated in St. Charles County, Missouri, and Mertia Callaway, et al, defendants (not on appeal) sitting jointly, as well as the testimony produced before Judges Davis and Moore, sitting separately in the above entitled causes, may be consolidated and printed as the testimony and used as a part of the record in each of the two above entitled causes.

[fol. 6] It is further agreed, however, that the testimony as to valuation in Case No. 765, tried before Honorable John C. Collet, dealing with the question of valuation of the property condemned belonging to Miss Mertia Callaway, may be omitted from said transcript.

HARRY C. BLANTON,
United States Attorney.

WILLIAM R. GENTRY,
Attorney of record for
James Karl Muschany.

SAMUEL M. WATSON,
Attorney of record for
William M. Andrews.

[fol. 7] Petition in Condemnation.

United States of America, Plaintiff,
Docket No. 807. vs. At Law. Tract No. 24/233.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, Vera Muschany, Collector of Revenue of St. Charles County, Missouri, St. Charles County, Missouri, Hugo Rottman, executor of the estate of John Cunningham, deceased, Darst Bottom Drainage and Protective District No. 2, a corporation, Defendants.

[fol. 8] Petition in Condemnation.

(Filed April 9, 1941.)

To the Honorable, the Judges of the United States District Court for the Eastern District of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and M. Walker Cooper, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Sec-

retary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the judisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized [ane] empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the Secre- [fol. 9] tary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940 (Publ. Res. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 10] Tract No. 24/233

Certain land situated in the County of St. Charles, Missouri, known as Tract No. 24/233 and more particularly described as:

A tract of land situate in U. S. Survey No. 1670, Township 45 North, Ranges 2 and 3 East and being a part of Lots No. Five and Six as designated in the report of the Commissioners appointed to make partition among the heirs of William Hayes, deceased, and more particularly described as follows, to-wit:

Commencing at the Northeast corner of said Lot No. five, thence along the easterly line of said Lots No. 5 and 6, South 22 degrees 0 minutes West 28.40 chains, more or less, to the most Southern corner of said Lot No. 6, thence North 68 degrees West along the southerly line of said Lot No. 6, 13.14 chains to a point, thence North 22 degrees 0 minutes East 28.40 chains more or less, to the northerly line of said lot No. five, thence south 68 degrees East along the northerly line of said Lot No. five, 13.14 chains to the place of beginning, containing 33.33 acres more or less.

Also a strip of ground 16 feet wide, for use as a roadway to and from said tract of land hereinabove described off of the southerly side of said lot no. 6, extending from the westerly line of the tract of land hereinabove described, along the southerly line of the said Lot No. 6, North 68 degrees West, approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road running in a northeasterly and southwesterly direction and striking the South line of said Lot No. 6 about 10 chains

South 68 degrees East from the Southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said Lot No. 6, a distance of 16 feet therefrom.

Above described land is subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 11] (B)

That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

James Karl Muschany, Vera Muschany, Hugo Rottman, executor of the estate of John Cunningham, deceased, Darst Bottom Drainage and Protective District No. 2, a corporation

[fol. 12] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert reversionary interest and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, aliences, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors, and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and

claimants to easements in, or, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendants, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into Court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: that your petitioner has attempted to set forth the interest or estates of all persons, firms, and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that all of their rights, title, interests and estate, whatever it may be, [fol. 13] to all and singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sus-

tained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts appropos to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court, upon the filing of this petition, will make an order pursuant to the Act of Congress approved February 26, [fol. 14] 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servents, agents and employees may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this pe-

titioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By (s) Harry C. Blanton,
United States Attorney for the Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.
(s) M. Walker Cooper,
Special Assistant to the United States Attorney,
410 New Federal Building
St. Louis, Missouri.

[fol. 15] United States of America,
Eastern District of Missouri—ss.:

Before me, the undersigned, personally appeared Harry C. Blanton, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; and that this proceeding is in good faith for the purposes specified in the petition.

(s) HARRY C. BLANTON.

Subscribed and sworn to before me this 9th day of April, 1941.

JAMES J. O'CONNOR,
Clerk of the U. S. District Court
in and for the Eastern District
of Missouri.
By C. E. Rudolph, Deputy Clerk.

(Seal)

[fol. 16] Declaration Of Taking

(Filed April 7, 1941)

To the Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United State, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved

February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved July 2, 1917 (40 Stat. 241), as amended by the Act of Congress approved April 11, 1918 (40 Stat. 518; 50 U. S. C. Sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress, 3d sess.), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for such other uses incident thereto. The said lands have been selected by me for acquisition by the United States [fol. 17] for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject however to all existing rights for easements for public roads, pipe lines and public utilities, in, across and over the lands acquired.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 3rd day of April, A. D., 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the United States.

[fol. 18] Schedule "A"

The land which is the subject matter of this Declaration of Taking and of this condemnation is situate in the County of St. Charles, State of Missouri. A description of the lands taken, together with a list of the purported owners thereof, and a statement of the sum estimated to be just compensation therefor is as follows:

Tract 24/233

Description:

A tract of land situate in U. S. Survey No. 1670, Township 45 North, Ranges 2 and 3 East and being a part of Lots No. Five and Six as designated in the report of the Commissioners appointed to make partition among the heirs of William Hayes, deceased, and more particularly described as follows, to-wit:

Commencing at the Northeast corner of said Lot No. five, thence along the easterly line of said Lots No. 5 and 6, South 22 degrees 0 minutes West 28.40 chains, more or less, to the most Southern corner of said Lot No. 6, thence North 68 degrees West along the southerly line of said Lot No. 6, 13.14 chains to a point, thence North 22 degrees 0 minutes East 28.40 chains more or less, to the northerly line of said lot No. five, thence south 68 degrees East along the northerly line of said lot No. five, 13.14 chains to the place of beginning, containing 33.33 acres more or less.

Also a strip of ground 16 feet wide, for use as a roadway to and from said tract of land hereinabove described off of the southerly side of said lot No. 6, extending from the westerly line of the tract of land hereinabove de-

scribed, along the southerly line of the said Lot No. 6, North 68 degrees West, approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road running in a northeasterly and southwesterly direction and striking the South line of said Lot No. 6 about 10 chains South 68 degrees East from the Southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said Lot No. 6, a distance of 16 feet therefrom.

Names of Purported Owners: James Karl Muschany and Vera Muschany. Estimated Compensation: $950.00

The gross sum estimated to be just compensation for the lands hereby taken is $110,110.00.

[fol. 19] In the United States District Court, Eastern District of Missou·i, Eastern Division.

United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, et al., Defendants.

Tract No. 24/233

Order and Judgment on Declaration of Taking

(Filed April 9, 1941)

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 771 on April 7, 1941, and upon consideration of said motion and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 771, the Court, having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land

described in said petition, and also under authority of the Attorney General of the United States:

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 771 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United S[illegible] of America, for the purposes therein set forth;

[fol. 20] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in the said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth: That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 24/233, in the amount of Nine Hundred and Fifty Dollars and no/100 ($950.00), and that said sum was deposited in the Registry of this Court in Case No. 771 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh: That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 24/233, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered and Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of

the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 21] Tract No. 24/233

Certain land situated in the County of St. Charles, Missouri, known as Tract No. 24/233 and more particularly described as:

A tract of land situate in U. S. Survey No. 1670, Township 45 North, Ranges 2 and 3 East and being a part of Lots No. Five and Six as designated in the report of the Commissioners appointed to make partition among the heirs of William Hayes, deceased, and more particularly described as follows, to wit:

Commencing at the Northeast corner of said Lot No. five, thence along the easterly line of said Lots No. 5 and 6, South 22 degrees 0 minutes West 28.40 chains, more or less, to the most Southern corner of said Lot No. 6, thence North 68 degrees West along the southerly line of said Lot No. 6, 13.14 chains to a point, thence North 22 degrees 0 minutes East 28.40 chains more or less, to the northerly line of said lot No. five, thence south 68 degrees East along the northerly line of said Lot No. five, 13.14 chains to the place of beginning, containing 33.33 acres more or less.

Also a strip of ground 16 feet wide, for use as a roadway to and from said tract of land hereinabove described off of the southerly side of said lot No. 6, extending from the westerly line of the tract of land hereinabove described, along the southerly line of the said Lot No. 6, North 68 degrees West, approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road running in a northeasterly and southwesterly direction and striking the South line of said Lot No. 6 about 10 chains South 68 degrees East from the Southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said Lot No. 6, a distance of 16 feet therefrom.

Above described land is subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 22] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered and Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 9th day of April, 1941.

(s) CHARLES B. DAVIS,
United States District Judge.

[fol. 23] United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, et al., Defendants.

Tract No. 24/233

Order Transferring Fund From The Declaration of Taking In Case No. 771.

(Filed April 9, 1941)

It appearing to the Court that in the Declaration of Taking filed with Case No. 771 on April 7th, 1941, there was paid into the Registry of the Court as estimated compensation for Tract No. 24/233, described in the petition filed herein, the amount of $950.00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $950.00, of the

whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 24/233.

(s) CHARLES B. DAVIS,
United States District Judge.

Dated, this 9th day of April, 1941.

[fol. 24] United States of America, Plaintiff,
Docket No. 807. vs. At Law.
33.33 Acres of Land, More or Less, and a Roadway Sixteen Feet Wide, Situate in St. Charles County, State of Missouri, and James Karl Muschany, et al, Defendants.

Separate Answer to Defendants James Karl Muschany, and Vera Muschany.

(Filed May 17, 1941)

Now come James Karl Muschany and Vera Muschany, his wife, and for their answer to plaintiff's petition in condemnation deny that they were, at the time of the institution of this action or at any time since said time, the owners of the fee simple title to lands referred to in plaintiff's petition or that they claimed any title or interest therein, and deny that they were at said time, or at any time since said time, in possession of said lands, or any part thereof, and assert that they had, long prior to the institution of this action, surrendered possession of said lands to plaintiff, pursuant to a valid contract between plaintiff and these defendants, as will appear more fully hereinafter.

Further answering, these defendants state:

That on and prior to November 29, 1940, they were the owners of the fee simple title to certain lands situated in the County of St. Charles, State of Missouri, more particularly referred to in plaintiff's petition as Tract No. 24 233, and the description thereof is fully set out by metes and bounds in said petition, which said description

is, by reference, incorporated herein and made a part hereof as fully as if here set out in full as therein set out.

That one R. Newton McDowell who was plaintiff's duly authorized agent for the purpose of acquiring lands by purchase, solicited defendants to submit an offer for the sale of their said land to plaintiff and supplied to de- [fol. 25] fendants an instrument entitled "Option to Purchase Land." That on the 29th day of November, 1940, defendants duly executed said instrument, in and by which they offered to sell to plaintiff the aforedescribed real estate for the sum of Four Thousand Five Hundred Dollars, returned the same to said McDowell, who, in turn, delivered it to plaintiff. Thereafter, on the 3rd day of December, 1940, the offer so made by defendants was duly accepted by and on behalf of the United States of America by R. D. Valliant, Colonel, Quartermaster Corps, United States Army, who was duly authorized to act for plaintiff in that connection.

That a true copy of the contract created by said offer and acceptance is attached hereto as Exhibit "A" and is by reference incorporated herein as fully as if here copied in words and figures. That by said contract it is agreed between defendants and plaintiff that defendants for themselves, their heirs, executors and assigns would sell and convey to the Government of the United States of America for a consideration of Four Thousand Five Hundred Dollars, the above mentioned real estate; that plaintiff was to have the right to the immediate occupancy and use of the lands for any purpose whatsoever, and defendants agreed to execute and deliver a general warranty deed conveying the fee simple title to the above described lands to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, and to furnish, without cost to the Government, a certificate of title of the Kansas City Title Insurance Company to said land satisfactory to the Attorney-General of the United States, and, upon approval of said title, defendants agreed to have a deed to said lands recorded and to have said title company furnish its certificate showing title to be good and marketable as vested in the United States of America, free of all encumbrances. Upon the furnishing of the final

certificate of title, plaintiff bound itself to pay the aforesaid purchase price to defendants.

That defendants did fully carry out and perform all of the obligations placed upon them by said contract and did, [fol. 26] by good and valid general warranty deed dated Feb. 20, 1941, convey said lands to plaintiff and delivered the same to the Kansas City Title Company, which company was the only authorized agent of plaintiff to receive said deed for plaintiff, and had made all of the necessary examinations of title without cost to plaintiff and supplied all of the required certificates of title, including a final certificate showing title in the United States Government, and that said contract has been fully executed and performed in each and every particular by defendants as far as plaintiff permitted them to perform the same; but defendants have not been paid the agreed purchase price, or any part thereof.

Defendants further state that they have, in reliance upon said contract, carried out the same as aforesaid and that they promptly surrendered possession of said lands to plaintiff, and that plaintiff long prior to the institution of this suit, went into possession thereof and ever since has been, and is now, holding exclusive possession thereof and making use of said property, and that plaintiff is estopped to abrogate or disclaim its obligation under said contract.

That the above mentioned contract between plaintiff and these defendants further provides that if, for any reason, the title to the land is not approved by the Attorney-General, The Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in the jurisdiction of which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with the terms and provisions of said option, and will, upon filing its petition in such proceedings, deposit said agreed purchase price with the Clerk of said Court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings. Defendants have conveyed good marketable fee simple title to all of said lands to the United States of America but defendants state that they have no information as to the final action of the At-

torney-General of the United States on this subject, except that the filing of this action in condemnation and the allegation that these defendants own or may claim to own [fol. 27] title to said property and that said land is subject to liens or claims for certain taxes and that other persons, named and unknown, are made parties herein so that all of the rights, title, interest and estate may be divested out of such persons and vested in the United States of America, indicate that the Attorney-General of the United States has not finally approved the title and that this action has been instituted by the United States of America pursuant to the aforesaid provision of the contract.

Defendants assert that if the Attorney-General has finally approved said title, then and in that event, plaintiff being at the time of the institution of this action the owner of the full and complete fee simple title to the property in question and being at said time in possession thereof, there is nothing to condemn by this action, this is a moot cause, and this court has no jurisdiction to proceed herein.

Defendants further state that they, in reliance upon the aforesaid contract, having conveyed their property to plaintiff and having surrendered possession thereof to plaintiff and plaintiff having for a long time past, been in full possession of said property, and having been, and now being engaged in using the same for its own purposes and benefit, plaintiff is estopped to proceed in this action contrary to its duties and obligations under said contract and is bound to carry on this proceeding in conformity with the provisions thereof, which are expressly applicable hereto.

Wherefore, defendants pray that the court without the appointment of commissioners or other intermediate proceedings, at once enter its verdict, judgment and decree, fixing the award for the land described in plaintiff's petition at Four Thousand Five Hundred Dollars, and requiring the plaintiff to deposit said agreed purchase price with the Clerk of this Court, the same to be disbursed by said officer pursuant to the decree entered in these proceedings.

(s) Wm. R. GENTRY,
Attorney for Defendants.

[fol. 28] United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, et al., Defendants.

Plaintiff Granted Time to Plead to Answer Filed

(Filed May 27, 1941)

On its oral application, plaintiff is granted thirty days from this date in which to plead to the answer filed in this cause by defendants James Karl Muschany and Vera Muschany.

(s) GEO. H. MOORE,
Judge U. S. District Court.

Dated this 27th day of May, 1941

[fol. 29] United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain land situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, et al., Defendants.

Plaintiff's Second Amended Reply to the Separate Answer of Defendants James Karl Muschany and Vera Muschany

(Filed April 3, 1942)

1. Comes now the plaintiff, the United States of America, by Harry C. Blanton, United States Attorney, Russell Vandivort, Assistant U. S. Attorney and Drake Watson, Special Assistant U. S. Attorney and for its reply to the separate answer of defendants James Karl Muschany and Vera Muschany, filed herein on May 17, 1941, their attorney of record, William R. Gentry, states that the plaintiff is not informed as to the truth of the allegations contained in said above mentioned answer and for lack of information denies each and all of the allegations therein contained and asks that the defendants be placed on strict proof thereof, and denies the conclusions of fact and of law therein stated.

2. Further replying, plaintiff states that if a purported option to purchase the land described in the peti-

tion herein was signed by the defendants by which they purported to agree to convey to the plaintiff said real estate and if thereafter said defendants did execute and deliver a general warranty deed to the Kansas City Title Insurance Company purporting to convey said land to plaintiff, and if said deed was thereafter placed of record in the Recorder's Office of St. Charles County, Missouri, that the same was done without the knowledge, consent, authority or approval of the plaintiff.

3. Plaintiff further states that one R. Newton McDowell and R. D. Valliant fabricated, designed and conceived a scheme to defraud the plaintiff and to cause the plaintiff to believe that the real estate comprised within the [fol. 30] Weldon Springs Ordnance Project and consisting of approximately 18,000 acres, was of the fair and reasonable market value greatly in excess of its actual and true market value;

(a) That said McDowell, as a part of said design and scheme, procured a purported agreement with the War Department of the United States of America, by the terms of which said purported agreement said R. Newton McDowell was to procure options to purchase on behalf of plaintiff from all the owners of the real estate comprised within said Weldon Springs Ordnance Area and was to procure said options upon a certain designated form entitled "Option to Purchase Land" from the respective owners of the various parcels of land therein located and said "Options to Purchase Land" were to contain offers by the owners of the lands offering to sell said lands for the fair and reasonable market value thereof;

(b) That by said option agreements it was provided that said McDowell was to receive as compensation to himself for procuring options on said real estate, the sum of five per cent of the option price as called for in said option agreements;

(c) That said McDowell pursuant to said scheme did thereafter and in the year 1940 and early part of the year 1941, procure from the various land owners of the lands located within said Weldon Springs Ordnance Area, purported options on said land and a purported option on the land described in the petition herein;

(d) That the said McDowell by the purported option so procured by him and covering the land described in the petition herein, represented to the plaintiff that the amount named in said option was the reasonable and fair market value of said real estate;

[fol. 31] (e) That said McDowell likewise, in pursuance of said scheme and in order to unjustly enrich himself, and by resorting to unfair and fraudulent methods and in violation of his duty to the plaintiff, procured purported options on all of the land located in said Weldon Springs Ordnance Area at prices which were far in excess of the reasonable and fair market value thereof; the procuring of said above mentioned purported options on the particular tract described in the plaintiff's petition being only a part of the scheme so designed by said McDowell in his said effort to defraud the plaintiff, United States of America;

(f) That pursuant to said scheme so designed by said McDowell, said McDowell procured the assistance and active cooperation of other parties in representing to the plaintiff that the price named in the various options covering said Weldon Springs Ordnance Area was the fair and reasonable market value thereof;

(g) That the land owners, including these defendants, and said McDowell did represent to the plaintiff that the price or consideration named in the said various purported options and in the alleged option entered into in this case, was the fair and reasonable market value of the lands covered or purported to be covered by said option agreements and by the purported option agreement covering the land described in the plaintiff's petition herein;

(h) That pursuant to said plan so conceived, said land owners as to the parcel of land described in the petition herein and the signers of the alleged options covering the other land located in said Weldon Springs Ordnance Area, represented and likewise said McDowell represented to the plaintiff that said amounts were the fair and reasonable market value of the real estate covered by said [fol. 32] purported options;

(i) That the plaintiff relied implicitly upon said McDowell and upon the representations said McDowell made to the plaintiff and reposed in him special confidence and trust and believed that the representations he so made as above set forth to the plaintiff were true and believed that he was procuring, on the part of the plaintiff and for the plaintiff, said real estate at no more than the fair and reasonable market value thereof;

(j) That the plaintiff never obtained or procured or had furnished to it or had access to any appraisement of any of said real estate prior to the purported acceptance of the purported option describing the land which is described in plaintiff's petition herein and never procured from said McDowell any bond or assurance of any sort whereby the plaintiff would be safeguarded or protected against fraudulent, faithless or unlawful representations or acts of said McDowell in procuring said real estate or any part thereof;

(k) That said McDowell and the defendants herein well knew that said real estate described by the purported option herein was represented to the plaintiff to be of a value greater than and greatly in excess of its fair and reasonable market value and with the full knowledge that said real estate was of the reasonable market value of only a small fraction of the value as stated in said purported option. That they also knew that the plaintiff was relying on the said representations as being true; that said false representations were so made to the plaintiff with the intent on the part of the makers of said representations, including said McDowell and said defendants, James Karl Muschany and Vera Muschany, that the plaintiff rely upon the same; that the plaintiff did rely upon the same and did believe that the said R. Newton McDowell was faithfully and efficiently acquiring the property described [fol. 33] in the petition herein at a price that was not more than the fair market value thereof;

(l) That if the purported option covering the tract of land described in the plaintiff's petition herein was signed by any official on behalf of the plaintiff Government, it was so signed without any knowledge of the value of said lands or of the value of the land described

in plaintiff's petition herein except such knowledge as is hereabove set forth;

(m) That if said purported option as to the tract of land described in the petition herein was purportedly signed by any official purporting to act for the plaintiff Government herein thereon, such so signing was purely an arbitrary act on the part of such official, that it was an act beyond the power or authority of said official to so bind or obligate the plaintiff Government. That it was in wanton and reckless disregard of the preservation of the rights and interest of the plaintiff Government and was in reliance upon the truth of the representations as hereabove set forth made to the plaintiff Government, when in fact those said representations were false;

(n) That during the time hereinbefore mentioned, one R. D. Valliant, Colonel, Quartermasters Corps, was the Chief of Real Estate Branch, Construction Division, Office Quartermaster General and was the person who originally contracted with said McDowell to secure said alleged options from the said landowners, said R. D. Valliant being also the person to whom said purported options were to be submitted by McDowell for approval and acceptance on behalf of the plaintiff.

(o) That the defendant herein, said R. Newton McDowell and said R. D. Valliant did conspire and agree to cause, and did cause to be included in the option price of the land which is being condemned herein, and did cause to be included in the option price of the other land [fol. 34] in the Welden Springs Ordnance Area, not only the reasonable value as represented by the owners, but in addition thereto, the five per cent (5%) commission to be received by McDowell, plus a one and one-half per cent (1½%) fee to be received by the Kansas City Title Insurance Company, said amounts being secretly included in the prices named in said purported options in spite of the fact that said purported option agreements specifically provided that said commission and fee were to be paid by the vendor.

(p) That the fact that said Commission and said fee were secretly included in the prices named in said purported options was a fraud upon plaintiff in that the de-

fendants herein, McDowell and Valliant, by so including said amounts, represented to plaintiff and led plaintiff to believe that said prices set forth in said purported options were the reasonable value of the land and that said option prices did not include said commission and fee, whereas in truth and fact the prices named in said purported options did include said fee and commission, and said prices were in excess of the reasonable value of the land by the amount of said fee and commission, as well as being in excess of the reasonable value thereof for the other reasons hereinbefore set forth.

(q) That said fraudulent misrepresentations on the part of the defendants, McDowell and Valliant were relied upon by plaintiff to its damage and caused the acquisition of the land herein by plaintiff to be delayed for a considerable length of time and necessitated additional expenses on the part of plaintiff in connection therewith.

(r) That said fraudulent misrepresentations were a breach of the fiduciary duty which said R. D. Valliant and said R. Newton McDowell owed to plaintiff as its officer and agent, respectively, and that said misrepresentations were a breach of the fiduciary duty which the defendants herein owed plaintiff as its citizens.

[fol. 35] (s) That the defendants seek in this case to take advantage of, and profit by, and to reap a reward by reason of all of the fraudulent and illegal acts hereabove and hereafter stated.

4. For its further reply to the separate answer of defendants James Karl Muschany and Vera Muschany, plaintiff denies that the plaintiff and the defendants entered into any valid binding contract for the purchase of the land described in plaintiff's petition herein, but admits that plaintiff has declined to pay the amount set forth in said alleged option contract, but plaintiff states that it stands ready and is now willing and able to pay the reasonable value of the land which is being condemned in these proceedings.

[fol. 36] 5. Further replying, plaintiff states that said alleged option is illegal, void and unenforcible because it is contrary to the provisions of the Act of July 2, 1940,

54 Stat. 712, as amended, entitled "An act to expedite the strengthening of the national defenses," which prohibits the use of "the cost plus-a-percentage-of-cost system of contracting", said alleged option being contrary to said provision for the following reasons:

(a) That said alleged option shows on its face that the commission to be paid R. Newton McDowell as agent for the Government, is increased by an increase in the option price of the land, thus putting a premium on inflated prices and causing the very evil at which said provision of said Act is directed:

(b) That said alleged option shows on its face that its terms are an illegal attempt to evade by subterfuge the said provision of said Act, in that said alleged option purports to evade the prohibition against a "cost-plus-a-percentage-of-cost" contract by illegally achieving the same result in a "cost-plus-a-percentage-of-cost-to-be-paid-by-the-vendor" contract, it being apparent that the latter arrangement is objectionable for the same reasons as the former.

(c) That the defendants herein, said R. D. Valliant and said R. Newton McDowell did conspire and agree to cause, and did cause to be included in the option price of said land not only the cash market value, as represented by the owner, but in addition thereto the five per cent (5%) commission to be received by said McDowell, plus a one and one-half percent (1½%) fee to be received by the Kansas City Title Insurance Company, so that the said alleged option became in truth and fact a "cost-plus-a-percentage-of-cost" contract, and it is therefore contrary to the express provision of said Act.

(d) That in addition to being illegal and void because it is contrary to the above Act, said alleged option is also illegal and void as being against the public policy expressed by the following Acts of Congress, all of which prohibit the use of the "cost-plus-a-percentage-of-cost system of contracting";

Sec. 2 (a) (1) of the Act of June 28, 1940, 54 Stat. 676

Sec. 1 (a) of the Act of July 2, 1940, 54 Stat. 712

Sec. 2 (c) of the Act of May 2, 1941, 55 Stat. 148

Sec. 201 of Title II of the Act of December 18, 1941, known as "The First War Powers Act, 1941", approved December 18, 1941.

[fol. 37] 6. For its further reply, plaintiff denies that the instrument described as "Option to Purchase Land" set out in full and attached by defendants to their separate answer herein and described as their "Exhibit A" constitutes any valid contract with said defendants James Karl Muschany and Vera Muschany, either under Title 50, Section 171, U. S. C., or any other Statute or law of the United States or of the State of Missouri and denies that said last designated document was accepted by any agent of the plaintiff authorized and empowered to bind the plaintiff, and denies that said document constitutes any enforceable, binding, valid agreement requiring the plaintiff to pay to the defendants the amount set out in said document for the following reasons:

(1) That said alleged option is invalid, void and unenfrocible because it fails to contain the provision set forth in Section 22 of Title 41, U. S. C., as amended which requires that:

"In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon. Nor shall the provisions of this section apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act (Title 7, chapter 26), the Federal Farm Loan Act (Title [fol. 38] 12, chapter 7), the Emergency Farm Mortgage Act of 1933 (Title 12, chapter 7), the Federal Farm Mortgage Corporation Act (Title 12, Chapter 7), the Farm Credit Act of 1933 (Title 12, chapter 7), and the Home Owners' Loan Act of 1933 (Title 12, chapter 11), and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers; Provided, That such exemption shall be made a matter of public record."

(2) That said alleged option is invalid, void, and unenforcible because it provides for the payment of the 5% commission by the property owner and not by the Government, contrary to the provisions of Section 66, Title 5 U. S. C., which provides as follows:

"No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any state, county, or municipality, and no person, association, or corporation shall make any contribution, to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine."

(3) That said alleged option is invalid, void, and unenforcible because it is contrary to the rules and regulations of the Secretary of War, promulgated by the Secretary of War under the authority of Acts of Congress; said regulation being marked "Exhibit A" attached hereto and incorporated as fully as if set out herein.

(4) That said alleged option is invalid, void, and unenforcible because it was contrary to the provisions of the pertinent Federal Statutes which authorize purchase without condemnation only when the sum purported to be [fol. 39] agreed upon is the reasonable value of the land; whereas, in this case, the sum agreed upon and represented to be the reasonable cash market value of the land was $4500.00; whereas, in truth and in fact, the reasonable cash market value of said land was only $1500.00.

(5) That said alleged option is invalid, void, and unenforcible because it is contrary to public policy, for the following reasons:

(a) That said agreement authorizes the payment to R. Newton McDowell, who was soliciting offers to be submitted to the Secretary of War for his approval or rejec-

tion, a commission of 5% on the gross sales price, to be paid by the property owner, which was alleged to constitute the reasonable cash market value of the land, which provision constituted an inducement to said R. Newton McDowell to recommend to the Secretary of War an inflated, improvident, and excessive price; and which provision was wholly inconsistent with the duty of the said R. Newton McDowell to procure options at the lowest fair cash market value of said property for the Government:

(b) That said alleged option agreement because of such provision constituted a contingent brokerage contract which would have a tendency, first: to cause said R. Newton McDowell to recommend an inflated, excessive, and exorbitant valuation; and second: would have a tendency to cause the said R. Newton McDowell to use oppressive, improper, and corrupt methods to procure said options in order that he might obtain his contingent brokerage commission.

(c) That said R. Newton McDowell undertook to act in a dual capacity, and undertook at one and the same time to represent faithfully the United States Government and, at the same time, accept his pay from the property owner.

[fol. 40] (d) That the said alleged and purported option agreement was not negotiated directly between the defendant owner and the Government, but through the intervention of a third party intermediary, who attempted to act in a dual capacity, ostensibly representing the Government, but actuallly representing the property owner and himself, in order that his personal commissions might be increased at the expense of the Government to whom he owed his first loyalty and toward which he occupied a position of trust.

(e) That the price set out in the purported contract is excessive and unconscionable in that it would require the payment of $4,500.00 for the land which, in truth and in fact, was worth only the sum of $1,500.00 and for the plaintiff to pay said optioned amount for the taking of said land would result in a waste of public money and in the violation, by the plaintiff, of its duty to its citizens to see that no more than just compensation is paid for land taken by plaintiff for public use.

(6) That said alleged option is invalid, void, and unenforcible because it was so improvident and so unfair to the Government that it ought not, in equity and in good conscience, be called upon to perform thereunder, in this, to-wit:

(a) That, while the option offer provided for the payment of $4,500.00, the true cash market value of said property was $1,500.00.

(b) That the amount contained in said option offer included, as elements of value, certain elements which were improper elements of value or damage, in that, to-wit: there were included in said figure disturbance factors, expenses of removal, replacement value, allowances to tenants, damages for growing crops.

[fol. 41] (7) That said alleged option is invalid, void, and unenforcible because said contract is constructively, if not actually, fraudulent for the following reasons:

(a) That R. Newton McDowell, the alleged dual agent of the plaintiff, the defendant and R. D. Valliant represented to the Secretary of War and his duly accredited representatives acting for and in behalf of the plaintiff, that the figure submitted in said option offer was the actual reasonable cash market value of said land; whereas, in truth and in fact, he, the said R. Newton McDowell, and the said defendants both knew that the said figure contained certain elements and factors which did not properly constitute any elements of actual cash market value, in that it contained to-wit: disturbance factors, expenses of removal, replacement value, allowances to tenants, damages for growing crops, etc.

(b) That the said R. Newton McDowell, the alleged dual agent of both the plaintiff and the said defendants, and the said defendants represented the figure submitted to the plaintiff as the reasonable cash market value of said property to be $4,500.00; whereas, the said R. Newton McDowell and the said defendants, in truth and in fact, knew that the amount was not the reasonable cash market value of the property, but it was worth only the sum of $1,500.00.

(c) That, although the said R. Newton McDowell, the alleged dual agent of the plaintiff and the said defendants

and the defendants represented the value of this property to be $4,500.00, they and each of them knew that the Secretary of War and his accredited representatives had, at that time, no appraisals of said property and were utterly dependent upon the good faith of the said dual agent and [fol. 42] the defendant in representing the valuation of the property to the plaintiff; and that, because of said lack of appraisals and knowledge about the value of said property, the plaintiff's representatives were imposed upon by the said defendant owners and the dual agent, R. Newton McDowell, in misrepresenting the value of said property, and relied wholly upon said misrepresentations.

(d) That, as an agent for both the property owner and the Government, the said R. Newton McDowell, was required to exercise an utmost good faith and frankness in dealing with both parties, and required to have no secret understanding or agreement, and was prohibited from receiving any secret profits as a result of his said alleged agency but, notwithstanding said obligation on the part of said R. Newton McDowell, as was well known to the said defendants, the said R. Newton McDowell with knowledge, consent, and approbation of the defendant did not submit to the Secretary of War, for acceptance or rejection, a figure representing the actual cash market value of said property, but submitted a figure purporting to represent that cash market value, but which in truth and in fact constituted a figure containing not only the cash market value as represented by the owner but, in addition thereto, the 5% commission to be received by the said R. Newton McDowell plus 1½% to be received by the Kansas City Title Insurance Company, so that the amount so submitted did not actually represent the value of said property, but included these two additional improper elements, as was well known to the said defendants, but was unknown to the plaintiff, with the result that, in truth and in fact, the 5% commission to be paid to said R. Newton McDowell and the 1½% to be paid to the Kansas City Title Insurance Company was actually to be paid by the Government, and not by the property owner, as provided in said alleged op[fol. 43] tion agreement; and for the further reason that it was a secret practice of the said R. Newton McDowell, known to these said defendants herein and to the other

owners in this area, but unknown to the plaintiff and its representatives, that when disbursing the checks received in settlement of certain purchases the said R. Newton McDowell not only charged the Government with the commission, as aforesaid, contrary to the said alleged option agreement, but also undertook to charge commission upon commission, to the obvious disadvantage of both the owner and plaintiff.

(e) That the said R. Newton McDowell adopted the system of spotting his options and of placing inflated valuations upon said properties, with the aid and co-operation of these said defendants and other owners in said area, which had the inevitable effect of inducing other owners, owning the land in the vicinity of the lands contained in such spotted options, to increase the prices asked for the land; and that this practice was indulged in with the knowledge and consent of this defendant and other owners.

(f) That the said R. Newton McDowell, with the knowledge and consent of the property owners including these said defendants, has not been faithful to the trust imposed upon him as the alleged agent of the plaintiff, in that, he, the said R. Newton McDowell, has sought to stir up litigation against the plaintiff, has recommended the employment of attorneys to that end, and has failed and refused to attempt to renegotiate contracts on a more reasonable basis, and has permitted personal considerations to enter into the prices submitted by him to the War Department.

[fol. 44] (g) That there is such a gross disparity between the actual cash market value of the land involved in this proceeding, and the amount set out in said option that the Government ought not to be required to perform thereunder, in this, to-wit: that, while the cash market value of said land is set forth in said alleged option agreement as $4,500.00, in truth and in fact, said land was worth only the sum of $1,500.00.

(8) That the said contract is invalid, void, and unenforcible for the reason that at the time said alleged acceptance of said offer was executed by an alleged representative of the Government, it was entered into as a re-

sult of a unilateral mistake of fact, in this, to-wit: that, while the plaintiff without any knowledge of the actual cash market value of this property, and in the mistaken belief that the property involved in this suit possessed such reasonable cash market value of $4,500.00, the said defendants knew that, in truth and in fact, said property was not worth that amount, but was worth only the sum of $1,500.00, and that the said defendant owners ought not to be permitted to take advantage of this mistake on the part of the alleged representative of the plaintiff in assuming that the property was reasonably worth the amount set out in said option.

(9) That the said contract is invalid, void, and unenforcible for the reason that there is such a gross disparity between the actual cash market value of the land involved in this proceeding, and the amount set out in said option that the Government ought not to be required to perform thereunder, in this, to-wit: that, while the cash market value of said land is set forth in said alleged option agreement as $4,500.00, in truth and in fact, said land was worth only the sum of $1,500.00.

[fol. 45] (10) That the said alleged option is invalid, void, and unenforcible because to enforce said option contract would compel a breach of duty which both the plaintiff and the said defendant owners owe the public and the tax payers.

(11) That the said alleged option is invalid, void, and unenforcible because of the fiduciary relationship which should exist, and does exist, between all citizens, including these said defendants and their Government; and which would be violated by the payment to these said defendant property owners of the exorbitant price named in said alleged option agreement.

(12) That the said alleged option is invalid, void, and unenforcible because it was signed only by J. Karl Muschany and Vera Muschany and not by all the parties having an interest in and to said land, and that in addition to the said defendant (s) so signing having an interest in the land described in plaintiff's petition the following non-optioning parties had an interest in said land, to-wit:

Collector of Revenue of St. Charles County, Missouri;

St. Charles County, Missouri;

Hugo Rottman, Executor of the Estate of John Cunningham, Deceased;

Darst Bottom Drainage and Protective District No. 2, a Corporation.

[fol. 46] (13) Plaintiff states that Defendants by said separate answer set up a counter claim against the United States Government, Plaintiff herein, which is contrary to law and that said counter claim cannot be maintained by these defendants by answer in this condemnation proceeding.

Wherefore, having fully replied to the matters set out in defendants' separate answer, the plaintiff prays that said option contract, and said deed, if such there be of record purporting to convey to plaintiff the lands involved herein, be cancelled, set aside, and held for naught; or, in the alternative, that said purported option agreement and said last above mentioned deed, if any there be, be held to be null, void, and unenforcible against the plaintiff; that commissioners be appointed to assess the reasonable cash market value of said land; and for other and further relief as to the Court shall seem meet and proper.

(S) HARRY C. BLANTON,
United States Attorney.

(S) RUSSELL VANDIVORT,
Assistant U. S. Attorney.

(S) DRAKE WATSON,
Special Assistant.

Endorsed: Filed: April 3, 1942. Jas. J. O'Connor, Clerk.

[fol. 47] United States of America,
Eastern Judicial District of
Missouri, Eastern Division.—ss.:

Affidavit.

Harry C. Blanton, being first duly sworn, upon his oath deposes and says that he is the United States Attorney for

the Eastern Judicial District of Missouri; that, as such Attorney, he has read the foregoing reply and that the facts therein are true according to his best information and belief.

/s/ HARRY C. BLANTON,
United States Attorney.

Subscribed and sworn to before me this 3rd day of April, 1942.

JAMES J. O'CONNOR, Clerk,
(Seal) U. S. District Court.
By: /s/ Viola Mottaz, Deputy Clerk.

[fol. 48] Plaintiff's Exhibit A.

The following provision of Supply Circular No. 76, Purchase, Storage, and Traffic Division, General Staff, War Department, August 15, 1918, as amended by Supply Circular No. 32, April 29, 1919, reads as follows:

"The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid. Provided, however, it is understood that this covenant does not apply to the selling of goods through a bona

fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods."

General Orders No. 10, War Department, dated March 10, 1921, requires the insertion of the following mandatory clause in all formal contracts used by the supply branches of the War Department, to-wit:

"Covenant against contingent fees.—The contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul the contract or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business with others than the United States."

[fol. 49] As modified, this language became Article 11 of Standard form No. 32, approved by the Secretary of the Treasury on June 18, 1935, which reads as follows:

"Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purposes of securing business."

[fol. 50] **Motion to Strike Out Portions of Plaintiff's Reply.**

(Filed December 8, 1941.)

Comes now the defendant, James Karl Muschany, one of the defendants in the above entitled cause, and respectfully moves the Court to strike out of plaintiff's reply the following portions thereof, to-wit:

All of the second paragraph of said reply, beginning with the words "further replying" in the fifth line from the bottom of page one of said reply, and ending with the words "to be paid by said defendant" in the sixth line of the second page of said reply, and reading as follows, to-wit:

"2. Further replying, plaintiff states that if one R. Newton McDowell did solicit the defendant to submit an offer for the real estate described in the petition herein to plaintiff and did supply to the defendant an instrument entitled 'Option to Purchase Land,' and that shortly thereafter the defendant did execute said instrument by which he offered to sell the above described lands to Plaintiff for $4,500.00, that said action on the part of said R. Newton McDowell in so doing was without authority of law and was unenforcible and was not an effort made in good faith on his part to purchase said real estate at a reasonable and fair market value therefor and was so known to be by said defendant.

Also the fifth paragraph of said reply, beginning with the words "for its further reply" in the ninth line from the top of page 4 of said reply, and ending with the words "as if set out herein" in the fifth line from the bottom of page 5 of said reply, and reading as follows, to-wit:

[fol. 51] "5. For its further reply the plaintiff denies that it has entered into any valid contract with the defendant either under Title 50 Section 171 U. S. C., or under any Statute of Missouri; and denies that the document set out in haec verba in defendant's separate answer was accepted by any agent of the plaintiff authorized and empowered to bind the plaintiff; and denies that said document constituted any enforcible, binding, valid agreement requiring the plaintiff to pay to the defendant the amount set out in said document, for the following reasons:

(1) That said alleged option is invalid, void, and unenforcible because it fails to contain the provision set forth in Section 22 of Title 41 U. S. C. as amended which requires that:

'In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement or to any benefit to arise thereupon. Nor shall the provisions of this section apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act (Title 7, chapter 26), the Federal Farm Loan Act (Title 12, chapter 7), the Emergency Farm Mortgage Act of 1933 (Title 12, chapter 7), the Federal Farm Mortgage Corporation Act (Title 12, chapter 7), the Farm Credit Act of 1933 (Title 12, chapter 7), and the Home Owners' Loan Act of 1933 (Title 12, chapter 11), and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: Provided, That such exemption shall be made a matter of public record.'

(2) That said alleged option is invalid, void, and unenforcible because it provides for the payment of the 5% commission by the property owner and not by the Government, contrary to the provisions of Section 68, Title 5 U. S. C., which provides as follows:

'No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any state, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine.'

(3) That said alleged option is invalid, void, and unenforcible because it is contrary to the rules and regulations of the Secretary of War, promulgated by the Secretary of War under the authority of Acts of Congress; said regulation being marked 'Exhibit A' attached hereto and incorporated as fully as if set out herein.

[fol. 52] Also the entire paragraph marked (f) on page 10 of said reply, beginning with the words "that the said R. Newton McDowell" in the tenth line from the bottom of page 10 of said reply, and ending with the words "War Department" in the last line of said page 10, and reading as follows, to-wit:

"(f) That the said R. Newton McDowell, with the knowledge and consent of the property owners including this defendant, has not been faithful to the trust imposed upon him as the alleged agent of the plaintiff, in that, he the said R. Newton McDowell, has sought to stir up litigation against the plaintiff, has recommended the employment of attorneys to that end, and has failed and refused to attempt to renegotiate contracts on a more reasonable basis, and has permitted personal considerations to enter into the prices submitted by him to the War Department."

Also that portion of said reply in the paragraph marked 8 on page 11, beginning in the ninth line from the top of said page with the words "that the said contract is valid" and ending with the words "the amount set out in said option" in the tenth line from the bottom of said page 11, and reading as follows, to-wit:

"(8) That the said contract is invalid, void, and unenforcible for the reason that at the time said alleged acceptance of said offer was executed by an alleged representative of the Government, it was entered into as a result of unilateral mistake of fact, in this, to-wit: that, while the plaintiff without any knowledge of the actual cash market value of this property, and in the mistaken belief that the property involved in this suit possessed such reasonable cash market value of $4500.00, the defendant knew that, in truth and in fact, said property was not worth that amount, but was worth only the sum of $1500.00, and that the defendant owner sought not to be permitted to take advantage of this mistake on the part of the alleged representative of the

plaintiff in assuming that the property was reasonably worth the amount set out in said option."

Also those portions of said reply marked respectively 11 and 12, beginning in the fifth line from the top of page 12 of said reply, with the words "that the said alleged option is invalid" and ending with the words "St. Charles County, Mo." in the fifth line from the bottom of said page 12, reading as follows, to-wit:

[fol. 53] "(11) That the said alleged option is invalid, void, and unenforcible because of the fiduciary relationship which should exist, and does exist, between all citizens, including this defendant and his (her) Government; and which would be violated by the payment of this defendant property owner of the exorbitant price named in said alleged option agreement.

(12) That the said alleged option is invalid, void, and unenforcible because it was not signed by all the parties having an interest in and to said land, and that in addition to the said defendant (s) so signing having an interest in the land described in plaintiff's petition the following non-optioning parties had an interest in said land, to-wit:

Hugo Rottman, Executor of the Estate of John Cunningham, deceased;

Darst Bottom Draining & Protective District #2, a drainage district corporation;

Collector of Revenue of St. Charles County, Missouri, St. Charles County, Missouri."

And for ground for this motion this defendant respectfully states and shows to the Court that no part of the said portions of said reply herein moved to be stricken out, constitutes any defense to the matters and things set up in the answer of this defendant and particularly to the contract pleaded in said answer.

Wherefore this defendant moves the Court to strike out all of said parts of said reply.

/s/ WM. R. GENTRY,
Attorneys for Defendant,
James Karl Muschany.

[fol. 54] United States of America, Plaintiff,
No. 765. v.
94.68 Acres of Land in St. Charles County, Defendant.

Transcript of Evidence and Proceedings.

(Filed March 4, 1943)

Be It Remembered: That commencing on March 30, 1942, and during the March Term, 1942, of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, before the Honorables Charles B. Davis, George H. Moore and John C. Collet, the following proceedings were had:

Appearances.

Harry C. Blanton, United States Attorney; Russell Vandivort, Assistant United States Attorney; Drake Watson, Assistant United States Attorney, for the Government.

Samuel M. Watson, Esq.; Redick O'Bryan, Esq., Webster F. Karrenbrock, Esq., for the Defendant.

[fol. 55] Counsel read the pleadings in the case and orally argued their respective contentions before the Court.

(Evidence for Plaintiff.)

And thereupon the Government, to sustain the issues on its behalf, offered the following evidence:

Mr. Blanton: Your Honor, I would like to offer in evidence a document which I have already marked Government's Exhibit WD-1, which, together with the declaration of taking—which was referred to in the petition and which I will consider as part of this—was enclosed in the letter dated March 19, 1941, from the Secretary of War to the Attorney General, requesting the filing of this condemnation suit.

The document indicated was thereupon marked Government's Exhibit WD-1, and is in words and figures as follows, to-wit:

U. S. exhibit WD-1 is on file in the office of the Clerk of the Court of Appeals.

[fol. 56] Mr. Blanton: I next offer the instructions from the Attorney General to me, to file this suit, as Government's Exhibit marked Ag-1.

Government's Exhibit Ag-1, last offered in evidence, is in words and figures as follows, to-wit:

U. S. exhibit AG-1 is on file in the office of the Clerk of the Court of Appeals.

[fol. 57] Mr. Watson: For the purpose of this record, I want to object to the introduction of Government's Exhibit WD-1, in that it states that it is necessary to acquire this land, my objection being on the ground that the land had already been acquired and that there then existed no necessity for the acquisition.

Mr. Blanton: Is there any objection to Exhibit Ag-1, which is really a counterpart—that is the request from the Attorney General to me?

Mr. Watson: I object on the same ground, in that it contains an allegation of necessity.

Mr. Blanton: All this contains is instructions to me to proceed, and conveyed the other documents as the basis of the request from the Attorney General to me.

Mr. Watson: Let my objection stand to that, also.

Judge Collet: Objection overruled.

Mr. Watson: Note my exception.

Judge Collet: Exceptions are automatically saved—

Mr. Blanton: I think that will save time.

Judge Collet: They probably wouldn't be, without the agreement, and the agreement may be noted.

Mr. Blanton: That is satisfactory to the Government.

Mr. Watson: That is satisfactory.

Mr Blanton: We next want to offer the judgment of [fol. 58] the Court and the order of the Court granting permission to file this petition, the judgment based on the declaration of taking that was filed in this case, which was filed March 31, 1941.

Do you object to that, Mr. Watson?

Mr. Watson: No objection.

Mr. Blanton: I now would like to offer all of the process and the return of the Marshal on that process in this case, the minutes, the orders, the motions and the record proper in the Clerk's office, and as contained in this file, in order that it all may be before the Court.

Judge Collet: Is there any objection?

Mr. Watson: Not any.

Mr. Blanton: That I take it, Your Honor, constitutes our formal proof.

Judge Collet: I take it there is no question as to whether this property is being taken for public purposes?

Mr. Watson: No question, Your Honor.

Judge Collet: The necessity is not a judicial question.

Mr. Blanton: That is our view, although Mr. Watson made contention to the contrary.

Judge Collet: I assume the status of the matter is that the Government is entitled to proceed with this condemnation unless the option agreement should bar it. Does that [fol. 59] present the issue?

Mr. Watson: That presents the issue.

Judge Davis: Announce a recess until two o'clock.

At this point, at twelve-thirty o'clock P. M., a recess was had until two o'clock P. M.

[fol. 60] (Testimony for Defendant.)

After recess, on March 30, 1942, at two o'clock P. M., the following proceedings were had:

Thereupon the defendant, to sustain the issues on her behalf, offered the following evidence:

Mr. Watson: If the Court please, I ask the Court to take judicial notice of Title 50, Section 171, an Act authorizing the Secretary without further delay, upon the basis of offers made by the landowner, to purchase the land.

Judge Collet: What section?

Mr. Watson: Title 50, Section 171, U. S. C. A. Does the Court desire that the section be read?

Judge Collect: No.

Mr. Watson: I ask the Court to take judicial notice of Title 10, Section 72, U. S. C. A., the Act enumerating the duties of the Quartermaster General, and among them is the duty to acquire certain specified things for the Army, including all lands for military purposes.

I ask the Court to take judicial notice of Title 10, Section 16 of Volume II, Federal Code Annotated, which is the Act authorizing the President of the United States to prescribe regulations for the government of the Army.

Mr. Blanton, I have here Army Regulation 30—

(Here ensued private colloquy between Mr. Watson and Mr. Blanton.)

Mr. Blanton: I have no objection, Your Honor, sub- [fol. 61] ject to the right to object to it later, after I have had an opportunity to look at it. I have not seen it.

Mr. Watson: This may be marked Defendant's Exhibit 1.

(The document indicated by counsel was thereupon marked Defendant's Exhibit 1.)

Mr. Watson: I offer in evidence Army Regulation 30-1415, being an Army regulation prescribing the method whereby land may be acquired by the Quartermaster General.

Judge Davis: Is that published in—

Mr. Watson: It is published in the Army Regulations, Your Honor.

Defendant's Exhibit 1, being Army Regulation 30-1415, is in words and figures as follows, to-wit:

[fol. 62] Defendant's Exhibit 1.

*AR 30-1415
1-2

Army Regulations) War Department
No. 30-1415) Washington, July 10, 1939.

Quartermaster Corps

Real Estate; Acquisition

			Paragraphs
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Section I.

By Purchase

	Paragraph
General	1
Procedure	2
Vouchers	3

1. General.—a. Statutory authority required.—Land shall not be purchased for the United States without the specific authority of an act of Congress.

b. Opinion of the Attorney General.—The prior written opinion of the Attorney General in favor of the validity of the title and the sufficiency of the instruments of acquisition is required in all cases (R. S. 355; Dig. Ops. J. A. G. 1912, 913; 32 Op. Atty. Gen. 582) except when expressly waived by an act of Congress, in which case the prior written opinion of the Judge Advocate General is required.

*This pamphlet supersedes AR 30-1415, April 30, 1927.
1516530-39

c. Appropriation not to be exceeded.—No money in excess of the amount specifically appropriated for any site for a public building shall be paid for such a site, nor shall a contract be made for the payment of an amount in excess thereof.

d. Special appropriation not to be supplemented from general appropriation.—A special appropriation for the purchase of a definite tract of land may not be supplemented by funds from a general appropriation. (See 22 Comp. Dec. 559.

e. Government not to be obligated prior to approval by Secretary of War.—No contract or other agreement for the [fol. 63] acquisition of title to land will be entered into or executed prior to the approval of the project by the Secretary of War, as required by paragraph 7a, AR 30-1410.

f. Rights-of-way or easements.—It is often necessary for the War Department to acquire rights-of-way or easements over the property of others, generally by purchase. It is not necessary to have the Department of Justice pass upon the title to these rights, nor is an abstract of title necessary. The purchasing officer is required, however, to satisfy himself as to the sufficiency of the title.

2. Procedure.—a. Initiation of project; by whom and how made.—Any officer or other agency of the War Department desiring to initiate the acquisition of any real estate or interest therein will forward his recommendation thereon to the Quartermaster General, through military channels if the project is within the jurisdiction of a corps area commander; if not within the jurisdiction of a corps area commander, the recommendation will be forwarded through the chief of the arm, service, or bureau having jurisdiction over the project.

b. Action by the Quartermaster General.—Upon the receipt of the recommendation required by a above, the Quartermaster General will take full charge of the project, including—

(1) Presentation of the project for the approval of the Secretary of War. See paragraph 7a, AR 30-1410.

(2) Securing the opinion of the Attorney General or the Judge Advocate General. See paragraph 1b.

(3) Securing the approval by the Assistant Secretary of War of the details of acquisition. See paragraph 7b, AR 30-1410.

(4) Carrying approved projects to completion.

(5) In case of disapproval, notification thereof to the officer recommending the acquisition, through the same channels through which the recommendation was received.

(6) In certain cases, as required by c below.

c. When funds not under direct control of the Quartermaster General.—Whenever the funds applicable to a particular project are not under the direct control of the Quartermaster General, the recommendation of the chief of the arm, service, bureau, or other agency of the War Department having control of such funds must be secured, together with a statement that the funds are available and that procurement instructions will be immediately issued to the Quartermaster General if the purchase is authorized.

[fol. 64] d. Cooperation of the Department of Justice.—The cooperation of the Department of Justice and the local district attorney in the examination of the title will be obtained by the Quartermaster General through the Secretary of War.

e. Details prescribed by the Quartermaster General.—Details of the procedure for the acquisition of fee simple title to land will be prescribed in each particular case by the Quartermaster General.

3. Vouchers.—a. How prepared.—Vouchers for the purchase of land are prepared in the same general manner as those for ordinary purchases.

b. Description of the land; identical with deed.—The description of the land on the voucher must be identical with that given in the deed.

c. To be accompanied by copy of approval by Secretary of War.—Vouchers will be accompanied by an authentic

copy of the approval of the project by the Secretary of War.

d. Certificate required.--The following certificate must be placed on the voucher immediately following the description of the land:

I hereby certify that all the requirements of the Attorney General (the Judge Advocate General)* and the law respecting the purchase of the land described above have been (will be)*complied with and that full and clear title to said property is now (will be)* vested in the United States in accordance therewith.

. . . . . .
. . . . . .

[fol. 65] Mr. Watson: Mr. Blanton, I think you have certain documents here that you said would be made available for introduction.

Mr. Blanton: Tell us what they are.

Mr. Watson: Namely, Office Order No. 35 of the Quartermaster General's office, dated August 8, 1936.

Mr. Blanton: This is not a certified copy, but I will interpose no objection to the form of it, Mr. Watson (handing document to Mr. Watson).

Mr. Watson: I offer in evidence, marked as Defendant's Exhibit 2, the Office Order of the Quartermaster General's office, dated August 8, 1936. It is short, and I will read it:

"War Department

Office of the Quartermatser General
Washington

August 8, 1936.

Office Order)
No. 35)

1. Colonel C. R. Bennett, Q. M. C., having reported August 7, 1936, is assigned to duty as Executive Officer, O. Q. M. G.

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*Alternative wording.

2. Effective August 7, 1936, Lieut. Colonel F. J. Riley, Q. M. C., is relieved from duty as Executive Officer, O. Q. M. G.

By order of The Quartermaster General:

(Signed) F. J. RILEY,
F. J. RILEY,
Lt. Col., Q. M. C., Assistant."

That constituted, or appointed, Colonel Bennett the [fol. 66] Executive Officer of the Quartermaster General's office.

Now, Mr. Blanton, another order, namely, Office Order No. 6, February 17, 1937, of the Quartermaster General's office, to be marked Defendant's Exhibit 3.

(The document indicated by counsel was thereupon marked Defendant's Exhibit 3.)

Mr. Watson: I offer in evidence the following document here (reading Defendant's Exhibit 3):

"War Department

Office of the Quartermaster General
Washington

February 17, 1937.

Office Order)
No. 6)

Office Order No. 32, August 1, 1936, is hereby rescinded.

Effective this date, Lieut. Colonel R. D. Valliant, Q. M. C., now on duty in the Construction Division, Office of The Quartermaster General, is authorized to sign contracts on behalf of the United States, with the exceptions of such contracts as the law requires shall be signed by the Secretary of War, pertaining to the purchase or sale of real estate for the War Department, and all agreements and

contracts for personal services in connection with the real estate activities of the War Department.

By order of The Quartermaster General:

(Signed) C. R. BENNETT,
C. R. BENNETT,
Colonel, Q. M. C., Assistant.",

being the same man who was appointed by the previous Office Order as Executive Officer of the Quartermaster General's office.

[fol. 67] Now, Mr. Blanton, a letter from the President of the United States to the Secretary of War.

Mr. Blanton: I have a little copy of this. I much prefer to keep it, but I have no objection to your reading it into evidence.

Mr. O'Bryan: It may be read in evidence as an exhibit?

Mr. Watson: May this be read in evidence and admitted as read in evidence, without objection?

Mr. Blanton: No objection on our part.

Mr. Watson: (Reading)

"The White House
Washington

Oct. 17, 1940.

My dear Mr. Secretary:

Under the provisions of the Act of September 9, 1940 (Public No. 781, 76th Congress), and upon the recommendation of the Council of National Defense and the Advisory Commission thereof, I hereby give my approval to the following project under the War Department program for expediting production in connection with existing National Defense Programs:

Construction of a TNT and DNT Plant at
Weldon Springs, Missouri..... $14,500,000.

Sincerely yours,

(Signed) FRANKLIN D. ROOSEVELT.

The Honorable, The Secretary of War."

[fol. 68] EARL R. SUTTON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of defendant, as follows:

Direct Examination.

By Mr. Watson:

Q. State your name, please. A. Earl R. Sutton.

Q. What is your present business or occupation, Mr. Sutton?

A. Clerk of the Circuit Court, St. Charles County.

Q. Were you a resident of the Weldon Springs Ordnance area prior to its establishment? A. Yes.

Q. At that time, did you consult with other residents of the area with a view to satisfying yourselves as to whether or not this project had been approved by the War Department, and with a view to ascertaining whether R. Newton McDowell had authority of any nature to come and solicit options from landowners in that area?

A. We had discussed that between each other.

Q. What did you decide, if anything, to do about that?

A. I think at that time there was a committee and this committee sent a telegram to Secretary of War Stimson, to ascertain if Mr. McDowell was a legally appointed representative of the War Department, or Land Officer, and if this site had been designated as a site for the Weldon Ordnance—

Mr. Drake Watson: I object to the witness testifying as to the contents of a wire, if he has the wire.

[fol. 69] Mr. Blanton: It is right here.

By Mr. Samuel M. Watson:

Q. Did you receive a telegram in response? A. Yes.

Q. Is that the telegram you received? A. Yes.

Mr. Watson: With the request for leave of Court to withdraw this telegram and substitute a copy thereof, I offer in evidence the following telegram (reading Defendant's Exhibit 4):

"Nov 9 110P

E R Sutton Citizens Committee
St Charles Mo

Reurtel Oct Twenty Eight Weldon Springs Mo Area Has Been Approved By War Dept for Munitions Plant Site

Stop Property Will Be Purchased By Mister R. Newton McDowell And Agents Representing Office of The QM General Stop Mister McDowells Organization Directly Represents The Government

STIMPSON, Secy of War.
Wash DC"

That is all, Mr. Sutton, unless there are questions by the Government.

Cross-Examination.

By Mr. Blanton:

Mr. Sutton, I believe you are interested in some of the property out in the area yourself, aren't you?

A. Yes.

Q. What relation was Mr. Mike Sutton, deceased, to you? A. He was my father.

Q. Did you participate in the negotiation of the option between Mr. McDowell and the Mike Sutton estate?

A. Yes.

[fol. 70] Q. You handled that for the estate, did you?

A. I don't say I handled it. Each and every one that was interested in it signed the option.

Q. There were several of you heirs, in other words?

A. Yes.

Mr. Watson: At this point, I wish to object to that on the ground that the option of the Mike Sutton estate had no relation whatever to the Mertia Callaway option and to the cause involved here.

Mr. Blanton: It is offered, first, to show the interest of the witness; secondly, also to show a course of dealing. One of the charges here is a course of dealing, not only with Miss Callaway, but also with the other landowners, and there is a charge of fraud, which can only be proven by circumstances and course of dealing.

Mr. Watson: The interest of the witness in this is not material, the witness having been put on for the purpose of identifying the telegram, and the District Attorney having consented to the admission of the telegram in evidence.

Judge Collet: The last objection, I think, is a proper objection. This is not cross examination on any matter that he was inquired about.

Mr. Blanton: I didn't understand he had made that objection, but if he does, I am willing to make the witness [fol. 71] my witness for that purpose.

Judge Collet: All right. That may be done, and the objection is overruled.

By Mr. Blanton:

Q. Now, Mr. Sutton, I will ask you when you signed the option in the Mike Sutton estate, if you discussed with Mr. McDowell the items that went into the amount of that option.

Mr. O'Bryan: We object to the interrogatories from the District Attorney with reference to any other contract, or any other option taken of any other parties, attempting to impeach the validity of the option that has not yet been offered in evidence, by the defendant Callaway. It is not proper testimony. It is going into outside and extrinsic matters.

Judge Collet: Mr. Blanton, would it make your case more compact if you offered this evidence in your case?

Mr. Blanton: We don't particularly care. We thought that maybe we would be accommodating Mr. Sutton.

Judge Collet: That evidence comes out of order.

Mr. Blanton: I see no particular point about having him stand aside and putting it in later, unless there is—

Mr. O'Bryan: If the Court please, we insisted upon the Court hearing this motion to strike. The Court has [fol. 72] that under advisement at this time. There is a serious question of law with reference to going into these other contracts on their ideas and surmises that McDowell did this on guesswork, on conjecture. All of this testimony, and all of those allegations in that reply, are on their conjecture, and it would be more in accordance with orderly procedure that we introduce this contract, and then they can show by direct and positive evidence that fraud, if any, but they can not do it by conjecture. That is the difficulty in this case, this guesswork stuff.

Mr. Blanton: Whichever way the Court prefers to have this evidence presented is satisfactory to me.

Judge Collet: Overruled.

Mr. Blanton (to the reporter): Read the question, please.

(Last previous question read as follows:)

"Q. Now, Mr. Sutton, I will ask you when you signed the option in the Mike Sutton estate, if you discussed with Mr. McDowell the items that went into the amount of that option.")

A. Just what items do you mean?
Q. I will ask you if, among other items, included in this was an allowance to a tenant in the sum of $450.00.
A. That is right.

[fol. 73] Mr. O'Bryan: May it be understood that all these objections go to all this line of testimony,

Judge Collet: Yes.

Mr. O'Bryan: The same ruling and same exception?

Judge Collet: Yes.

Mr. Blanton: Q. I hand you a certified copy of a letter signed by R. Newton McDowell by D. M. Bolton, of February 13, 1941, which is marked Exhibit B-1—

Mr. Coburn: I think it might be well for us to understand about the other landowners now, who are represented by their lawyers, waiting for their cases to be reached, if they have any other objection that is to be made to any of this testimony that is coming up, should we register that objection?

I don't like to be jumping up and interfering with these other men in the trial of the case, but it occurs to me that we might be bound by objections that are made and rulings of the Court here, in our own case later on, if it is based on evidence that comes in now, plus whatever evidence may be peculiar to our own case. In other words, if I might interrupt the deliberations of the Court, what I have in mind with reference to this particular kind of testimony that is coming up now, is this: Mr. Sutton is

being asked what elements were taken into consideration in arriving at the price that finally was agreed upon between the Sutton estate and Mr. McDowell. It is the view of my client, through myself, in a later case here, [fol. 74] which is set, that that line of testimony is not admissible or competent in this case, not only for the reasons that have already been assigned, but also for the further reason that the final acceptance of that contract in this estate was an administrative act on the part of the Secretary of War, performed by an administrative officer, which can not be inquired into because it was a discretionary matter. It can not be inquired into by this Court, or any other court, simply because as a general proposition courts won't inquire into the discretionary act of an administrative officer. So, it follows from that, that what elements that officer took into consideration in arriving at a price can not be inquired into here in this litigation, or any other litigation. I mention that only because I think the objection should be made to this question and all similar testimony, for that reason.

I also have arisen to inquire as to the extent to which landowners in other cases will be bound by objections that are made, and rulings that are made, in this case.

Mr. Watson. Mr. Coburn raises the question as to whether it would be an interference with counsel in this proceeding, or other lawyers, if they make objections. I want to say that, so far as counsel in this particular proceeding are concerned, we have no objection to other lawyers making objections to the testimony, and I thought maybe the Court would like to know our attitude on that [fol. 75] matter.

Judge Collet: If this record is to be used in other cases it seems logical that counsel should be entitled to interpose additional objections. The question is whether or not the record is to be used —

Mr. Watson: We adopt Mr. Coburn's objection, Your Honor.

Judge Collet: That does not settle it.

(Here ensued private colloquy among the three judges.)

Judge Collet: The question is raised, Mr. Coburn, if you desire to participate in this record, do you desire to accept this record in so far as it may be applicable to your case? You understand what I mean?

Mr. Coburn: Yes, I think I do.

Judge Collet: If you do participate, would you take this record in your case, in so far as it is applicable?

Mr. Coburn: Well, I want to expedite this in every way possible—I suppose as a practical proposition it would be desirable for my client in her case to accept the record in this case. I suppose, however, that if that is done, the only practical way to handle it would be for me to have the liberty of rising to make any objection, for any reason at all, that might occur to me, as we go along in the trial of this case, although I am free to say I am re-[fol. 76] luctant to interrupt the lawyers trying this case.

Judge Collet: If you were to be bound by it you would have the right to object, and if you do have the right to object then we are curious about whether you expect to be bound by it.

Mr. Watson: I want to re-assert that I don't object to the interruptions, so far as I am concerned.

Judge Moore: I notice Mr. Gentry is shaking his head vigorously. I should like to hear his view.

Mr. Gentry: I am afraid, Your Honor, we are going to get into a situation that was described by Andrew H. Brown, over the radio, as "This here sure is a mess." I am just afraid we will get into that.

I don't like the idea at all of having to get up in the other man's case and saying I don't think his objection is good enough for mine, and I want to put some more n. I am willing, in my case, to adopt all that comes in in this case that I think is material, with the proviso that as to any case in which objections have been made, if I see fit to add to that objection in my case, I may do so—I would think that would be the preferable way, so, when I came to my case I would say "I adopt the testimony given by Mr. Sutton, and reserve the right to make this additional objection", and state the objection.

Judge Collet: The evidence would be received in one [fol. 77] case, and not in all, if his objection is sustained and yours overruled.

Mr. Blanton: They might make an objection that I could meet, if I had the witness here, which I couldn't meet if he was not here.

Judge Collet: Unless all the parties can agree, gentlemen, that if they are given the privilege of making their objections at this time they would accept this record in their case, we had better try one case at a time. If you can agree, then, of course, the trial of one case will, to a great extent, determine them all.

Do you understand what I have in mind?

Mr. Gentry: Yes, sir.

Judge Collet: What do you say? Is there someone who feels that he could not conscientiously agree to accept this record, if he has the right to make objections?

Mr. Gentry: I feel that I would accept it as far as applicable in my case. I would think the suggestion could be made to counsel who are actually trying the case, and if they see fit to make the objection, all right, and if not, I would like to have leave to make it, but I would rather they would make it in the first instance, but my suggestion—

Mr. Watson: If the Court please, that would be satisfactory to me, except that I see no reason why other counsel should not make the objection directly, and save time. [fol. 78] To have one lawyer approach me and suggest an objection, and then I consider that and make the suggestion, it slows up the procedure.

I am willing to invite all these gentlemen to make objections in my case. I am satisfied with that arrangement and it will be no trespass whatever on my prerogative.

Mr. Gentry: I think you are mighty good natured to consent to that.

Mr. Watson: I think I am serving the interest of my client.

(Here ensued private colloquy among the three judges.)

Judge Collet: We think that we had better proceed upon the assumption that we are trying this one case; that it would be impracticable to undertake in advance—

Mr. Coburn: In view of the fact that this record may be accepted by parties in other cases set here today, the lawyers in those cases will be permitted to interpose objections, if they want to do so, in view of the fact that they may accept the record later?

Judge Collet: I think not, Mr. Coburn. I don't mean by that that we would be averse to having you make objections, but you would not be obligated to make them, nor expected to make them, since we are trying this one case. If, after the record is made, you feel free to accept it in your case, that would be fine; if not, you won't be [fol. 79] asked to.

Mr. Coburn: I understand that we would have a right to interpose objections if we want to?

Judge Collet: I should think that, unless we proceed upon the assumption that this record is to be used by the others, that these objections made by other counsel would not be desirable.

Mr. Coburn: I just wanted to get the view.

Mr. .....: May I inquire if this understanding is acceptable to Mr. Blanton?

Mr. Blanton: Certainly, any arrangement that is acceptable to the Court is perfectly acceptable to me.

Judge Collet: The arrangement now is that we are trying this one case. We would like very much to try them all at once, but it does not seem to be advisable.

Now, where were we?

Mr. Blanton: I was about to hand Mr. Sutton a paper—

Mr. Watson: I object to any inquiry of Mr. Sutton relative to this letter that Mr. Blanton contemplates handing him, on the ground that the matter is not covered in the direct examination.

Mr. Blanton: I am making him my own witness.

Judge Collet: That objection is overruled.

By Mr. Blanton:

Q. I hand you this document to which I [fol. 80] just referred a moment ago, and ask you to look at those figures of the so-called break-down of the Mike Sutton tract: Do those figures conform to your recollection as to what went into that option?

A. I think that is right, Mr. Blanton. I think the figures are that. I have a copy of the option, I believe.

Q. Do you have it with you?

A. I believe I have. I rather think the figures—

Q. The option was $13,800?

A. I think that is right.

Q. But the break-down is as follows: 129½ acres of land at $90.00 per acre, $11,655; 5-room house, barn, sheds, and so forth, $1,200; tenant release, $450.00 which makes a total of $13,305—and that total includes the tenant release of $450.00, whereas the option calls for $13,800. Now, what did that $495.00 difference between the total of those three items and the amount of the option consist of?

Mr. Watson: That is objected to on the ground that it is immaterial in this proceeding, for the reason that the Secretary of War had the discretion to purchase this land at a price in his opinion reasonable, and this Court has no jurisdiction to review his exercise of that discretion and to consider what elements the Secretary of War considered in arriving at the price.

Judge Collet: Overruled.

[fol. 81] A. How much was that, $495?

Mr. Blanton: Q. Yes, the total of the three figures for the land, the buildings on the land, and this tenant release, total $13,305, as totalled in this tabulation, whereas, the option was for $495 in excess of those three items, or $13,800.

A. I think, as well as I remember at this time, it became necessary to have a separate agreement between the landowner and the tenant, setting up the fact that the

landowner had no right to sell out the tenant's rights, and the tenant would have to be compensated. We agreed upon a price of about ten dollars an acre, in that neighborhood, I think—I don't just remember—and then breaking it down is where the tenant came in. We had to pay the tenant and we had an agreement signed between, I think, Mr. McDowell and the heirs of the property and the tenant, that the tenant was supposed to get whatever that amount was.

Q. $450.00?

A. I don't know what it was.

Q. But in addition to the $450.00 to go to the tenant what was that $495.00 in the option to represent?

Mr. Watson: We object to any testimony pertaining to the price of this land, or any of the land, for the reason that it is improper testimony at this stage of this condemnation proceeding. The District Attorney, to be sure, [fol. 82] has asked for a rescission of the contract in this proceeding, but that is an improper prayer, this being a condemnation proceeding, and evidence of land value is not proper at this stage of the proceeding.

Judge Collet: Overruled.

A. I don't know whether—to satisfy the tenant we realized, the landowners realized, that to get possession of the land we had to buy the tenant out, and we had—there was a separate agreement between the landowner and the tenant, that when the money came in it would be disbursed out of that to pay the tenant, whereby they might acquire title to the property.

Mr. Blanton: Q. I know, but this breakdown shows that there was $450.00 allowed to the tenant, but in addition to that $450.00 allowance, those three items including the allowance to the tenant only equal $13,305, whereas the option was $13,800, $495 in excess of the amount to be paid for the land, the buildings, and the allowance to the tenant.

Mr. O'Bryan: We object to this line of testimony at this time, for the first reason that Mr. Blanton has accepted this witness as his own witness. He is attempting at this time to put in testimony to impeach the contract

between Callaway, the defendant, and the United States Government. He is attempting to impeach this contract on a collateral issue, with reference to another sale of [fol. 83] property, or option taken by another party. This evidence at this time is highly objectionable and non-admissible for any reason.

Judge Collet: Overruled.

The Witness: I don't remember these figures that you have, Mr. Blanton, whether those figures are correct, or not, in the break-down, but I do know that the option as a whole called for $13,800; that the Kansas City Title Insurance Company probably had a copy of the agreement between us and the tenant, as to what he was to receive.

Mr. Blanton: Q. Mr. Sutton, were you present at a mass meeting out at the Howell School House, when Mr. McDowell and Senator Williams and a great many of the landowners, and various attorneys, were present, when this project was under discussion? A. Yes.

Q. I will ask you further if, during that conversation, or at least during that mass meeting, you heard anybody ask Mr. McDowell this question: "If McDowell was the agent of the United States Government how could he charge the landowners five percent. commission for making the sale?"

Did you hear that question, or the substance of that question asked?

Mr. Watson: I object to the witness answering that question, because it is entirely irrelevant to the issues in this case, what McDowell said at that meeting, or what [fol. 84] questions he was asked, the contract being between United States and Mertia Callaway, and the United States and other owners, and McDowell having no power to accept or reject the prices, no final power to make the contract, and anything that McDowell may have said at a public meeting, or elsewhere, is entirely irrelevant and inadmissible for any purpose.

Judge Collet: That objection is overruled.

Mr. Blanton, you are not going into the details of your case at this time, are you, with this witness?

Mr. Blanton: I want to show that, and as far as I was concerned, I was through with Mr. Sutton, Your Honor.

Judge Collet: Go ahead to that extent.

By Mr. Blanton:

Q. Did you hear that question asked, Mr. Sutton?

A. Repeat the question.

Q. I will ask you if you didn't hear, at that mass meeting, this question asked Mr. McDowell: "If McDowell was the agent of the United States Government, how could he charge the landowners five per cent, for making the sale?", or the substance of that.

A. There was quite a few questions asked McDowell that night, and I don't remember. That question may have been asked. I just can't recall it now. It seems to me like a question like that was asked, but I don't remember.

Q. What answer did McDowell make as to how that [fol. 85] five per cent. was to be handled?

A. I don't remember that.

Q. Did you give a statement on December 2, 1941, to Mr. Frank Stabb, an agent of the Federal Bureau of Investigation?

Mr. O'Bryan: We object. It is an attempt to impeach his own witness, or attempting to refresh the memory of of his own witness. This is his witness now. He has taken him for that purpose, and we object to this line of questioning for that reason.

Judge Collet: Overruled.

By Mr. Blanton:

Q. Did you know Mr. Stabb?

A. I did.

Q. I hand you what purports to be a copy of that statement.

A. This here bottom part (indicating)?

Q. Yes; beginning right here.

A. I don't remember answering that question that way. It may have been answered.

Q. I also hand you—I call your attention to the concluding paragraph of that statement.

Mr. Watson: May I see that?

Mr. Blanton: Yes, indeed (handing document to Mr. Watson).

A. This one here (indicating on document)?

Q. Yes.

A. I don't think I made just that statement. I think it was something similar along that line.

Q. You may state if that statement was made by you [fol. 86] to Mr. Stabb—you signed that statement, did you not?

A. I think I did, but I don't know whether it was just worded that way or not.

Q. You may state what did occur there in connection with a five per cent. commission, what statement was made by Mr. McDowell in answer to that question, and also what statement was made by Senator Williams, that he heard.

A. I think it was discussed quite a bit, the five per cent. commission. It seemed to me like there was some clauses in the option that was discussed between the attorneys. It seems as though they didn't understand the option and the landowners were told by some of the attorneys, or cautioned by some of the attorneys, especially Senator George H. Williams, that probably in signing up these options if they set a price and added on there five per cent. commission, that they might be charged with conspiring against the Government; something to that effect.

Q. I will ask—

Mr. O'Bryan: We move to strike all that out, because it is immaterial to any issue in the case on trial.

Mr. Blanton: That is one of the very charges made.

Judge Collet: The motion to strike is overruled.

By Mr. Blanton:

Q. I will ask you if during that mass meeting Mr. McDowell didn't make the statement to everybody as- [fol. 87] sembled there, that the landowners, despite the provision in the option, would not be called upon to pay this five per cent., but he was adding that to the value of the land and charging the Government with it?

A. I don't remember him saying anything like that.

Q. What did he say about that?

A. I don't just remember what he said, but everybody knew that the—whatever the option price was, whatever the gross amount of your option price was, you would have to pay a five per cent. commission to McDowell, and also the fee to the Kansas City Title Insurance Company, whatever that may be.

Q. I know, but what statement did McDowell make at that mass meeting about who was going to have to pay that?

A. That would be pretty hard for me to remember. There was quite a few statements made. I don't remember what McDowell said about the five per cent, commission, how it would be handled.

Q. Did he make the statement that it would be absorbed by the Government? A. Not that I remember.

Q. Did he make any statement to that effect?

A. That it would be absorbed by the Government?

Q. Yes. A. Not that I remember.

Q. What brought forth the statement of Senator Williams that if it was absorbed by the Government that, in the face of this option, that would possibly constitute conspiring against the Government?

[fol. 88] A. I think Senator Williams was of the opinion that if you did set a price on the property and then added the commission on that, they would be conspiring against the Government.

Q. So that, the matter of adding the commission on these prices was discussed there, was it?

A. I think it was, yes.

Q. Was Mr. Bolton there at that meeting, Mr. Sutton?

A. I don't remember whether Mr. Bolton was there or not. I don't think he was.

Mr. Blanton: All right. That is all.

[fol. 89] MERTIA Z. CALLAWAY, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of defendant, as follows:

Direct Examination.

By Mr. Watson:

Q. State your full name, Miss Callaway.

A. Mertia Zenobia Callaway.

Mr. Gentry: Please raise your voice, Mr. Watson.

Mr. Watson: I will be glad to.

Q. Were you born and reared in the Weldon Springs Ordnance plant area, that is, the area that is now the Weldon Springs Ordnance area?

A. I was.

Q. Did you own land there at the time that that project arose? A. Yes, I did.

Q. How long had you owned that land, about?

A. Well, since the death of my mother, in 1917.

Q. You inherited that land from your mother?

A. I did.

Q. What was the first that you ever heard about the Weldon Springs Ordnance Project?

A. I read about it in the paper.

Q. And then what next?

A. I have to think a minute. I got a letter from Mr. McDowell saying that my farm was within that area.

Q. Did he say anything about any duty on his part in connection—

[fol. 90] Mr. Blanton: We suggest that the letter, if there was a letter, would be the best evidence of what was said.

Mr. Watson: Very well. We haven't that letter.

Q. What did you do next?

A. Well, I consulted with you—I told you what I wanted for my farm and asked you to go to Mr. McDowell and negotiate with him for me.

Q. What price did you tell me you wanted for your farm? A. One hundred and twenty-five dollars.

Q. And then what was your next connection with this transaction? A. Well, I—

Q. Did I report to you?

A. Yes, you reported to me, and when you reported I decided that I would take one hundred and fifteen.

Q. One hundred and fifteen dollars per acre?

A. One hundred and fifteen dollars per acre, yes.

Q. What happened next in connection with this transaction?

A. Well, a representative of Mr. McDowell, Mr. Williams, came to see me.

Q. What took place when he came to see you?

A. Well, when he came he had the number of acres in the option 103 and some hundredths—I have forgotten just the exact figures, so I said to him that my abstract only called for 94.68, and so then he said that he thought it would be—he would have the girl recheck the record and see if there was more acreage. Of course, if there was, I [fol. 91] wanted the money for it, and if not, I did not; I just wanted what was coming to me, and so he advised me to meet him at Mr. McDowell's office in St. Charles the next day, which I did, and he said that they had not—when they rechecked the records they didn't find the mistake and he suggested that we go over to the Emmons Abstract Company, which we did, and there they showed that the actual acreage was 94.68.

Q. Then what took place?

A. We went back to the office and I signed the option for 94.68 acres at one hundred and fifteen dollars.

Q. And what did you do with that option when you signed it? A. Well,—

Q. You gave it to Mr. Williams, did you?

A. Surely. He kept it.

Q. What was the next thing you did in connection with that transaction, Miss Callaway?

A. Well, I went up to St. Charles and signed the deed.

Q. Where did you go to sign that deed?

A. To the Kansas City Title Company office.

Q. They had an office there in St. Charles? A. Yes.

Q. And you went to that office, is that right?

A. Yes, and signed the deed.

Q. And what did you do with the deed when you signed it? A. I left it with them.

Q. Left it with the Kansas City—

The Witness: With the understanding that it would be [fol. 92] sent to the War Department.

Q. Since that time you have never received payment—

The Witness: I have not—

Q. —according to the terms of that option?

A. No, sir.

Q. I will ask you, Miss Callaway, if that is the option that you signed; is that one of the triplicate copies of the

option that you signed (indicating Defendant's Exhibit 5)?

A. It is.

Q. By the way, when you signed this option and gave it to Mr. Williams, did you sign it in triplicate?

A. I did.

Q. Did you later receive this copy of this option?

A. Yes, sir.

Q. And how did you receive it?

A. It came through the mail.

Q. It came through the mail? A. Yes.

Q. From whom?

A. The War Department.

Q. The War Department?

A. I think—I guess—I don't know whether at St. Charles or—well, let me see—

Q. You don't remember who sent you the option?

A. No, I really don't, and I wouldn't say, when I don't.

Judge Davis: Do you know how she got it?

Mr. Watson: I know how she got it.

Mr. Blanton: I am admitting she got it. We are not making any point whether it was delivered in person or not.

The Witness: I know it came through the mail and I [fol. 93] suppose it came from St. Charles.

Mr. Watson: It was sent to her, Your Honor, by Mr. McDowell; transmitted to her by Mr. McDowell, by letter.

The Witness: I know I got it by letter, I know that, but as to where it was mailed, I couldn't be sure.

Q. When you received this option did you notice anything on it that had not been on it before?

A. I certainly did.

Q. And what was that?

A. That it was accepted by and on behalf of the United States Government this 27th day of November, 1940, R. D. Valliant, Colonel, Quartermaster General of the United States Army.

Mr. Watson: Mr. Blanton, I believe you agreed that you would admit that this is the signature of R. D. Valliant?

Mr. Blanton: Yes, I will admit that that is the signature of R. D. Valliant.

Mr. Watson: I now offer this document in evidence, Your Honor.

Mr. Blanton: We want to make a formal objection, without repeating what we said. We are making the same objection that we plead in our reply, that it is invalid, for several reasons.

Judge Collet: The exhibit will be received, subject to that objection.

The document entitled "Option to purchase land", being [fol. 94] Defendant's Exhibit 5, is in words and figures as follows, to-wit:

Defendant's Exhibit 5 is an option contract similar in form to other exhibits in this regard of like tenor, and is on file in the office of the Clerk of the Circuit Court of Appeals.

[fol. 95] Mr. Watson:

Q. Did you have a tenant on this land, Miss Callaway?

A. Yes; Fritz and Joe Schulte had it leased for pasture.

Q. You say that you received a letter transmitting that option?

A. Yes, sir.

Q. You said, I believe, that it was either from—did you say it was through someone, or—

A. I first said I thought it was from the War Department in Washington, and then I was not sure, so I said I didn't remember where it was from.

Q. Were you notified by that letter to give possession of the property, or do you remember?

A. I don't remember. I think so, but I am not sure. I am sorry I didn't keep it.

Q. Did you negotiate with your tenant to yield possession of that property?

A. Yes, I did, or through my agent, Mr. C. C. Stewart.

Q. Were you present, too, when he talked to your tenant?

A. Yes. We had a—I think you had gotten the proper blanks to be filled out and he signed them.

Q. I will ask you if that is the agreement that was signed between you and your tenant (handing document to witness).

A. It is.

Q. Did you see your tenant sign this agreement?

A. I did; I surely did.

[fol. 96] Q. Did you see Joe Schulte sign it?

A. I did, yes.

Q. Did you see Fred J. Schulte sign it? A. I did.

Q. Is that your signature? A. It is.

Mr. Watson: I now offer this document in evidence, Your Honor, which I will read:

(Indicating Defendant's Exhibit 6).

"For the consideration of $67.50 we do hereby consent to Mertia Callaway giving an option to the United States of America covering the sale of his property which entails immediate possession by the Government.

I am a tenant on the Mertia Callaway farm, the situation has been fully explained to me and I enter no objection and do hereby agree to remove all my personal property from the premises in accordance with the option agreement given in to the United States of America by Mertia Callaway.

This agreement will be effective when the option on this property is accepted by the United States of America.

(Signed) JOE SCHULTE,
(Signed) FRED J. SCHULTE,
Tenant.

(Signed) MERTIA CALLAWAY,
Land Owner.

(Signed) C. C. STEWART,
Witness."

Mr. Watson: That is all.

Cross-Examination.

By Mr. Blanton:

Q. Miss Callaway, who is Mr. C. C. Stewart, please, who signed this as a witness?

A. He is my cousin.

[fol. 97] Q. He is your cousin? A. Yes.

Q. He represented you in negotiating this settlement with your tenant, did he?

A. Leasing and everything, yes.

Q. Neither of these gentlemen named Schulte signed the option contract which you signed for Mr. McDowell's representative?

A. No. That is what they signed. (Indicating Defendant's Exhibit 6)

Q. You alone signed for your land and didn't ask them to sign?

A. No, sir.

Q. The Government was not a party to this contract which you made with your tenant, was it? A. No.

Q. Miss Callaway, what kind of improvements were on your property there that you undertook to sell to the Government for one hundred and fifteen dollars an acre, you say?

Mr. Watson: We object to the question, first, because it was not covered in the direct examination; second, because the approval of that option was an approval within the discretion of the Secretary of War and not reviewable by this Court.

Judge Collet: Overruled.

A. Well, there were not very much improvement on it.

Mr. Blanton:

Q. There had not anybody lived on the place for many, many years?

A. No, there had not.

Q. I hand you a picture and ask you if that is not a true representation of the condition of the improvements on this ninety-four acre tract (handing picture to the witness).

A. Yes, that is—I don't claim anything for improvements.

[fol. 98] Mr. Blanton: I ask that this be marked as Government's Exhibit 2.

Mr. Watson: My same objection goes to that.

Judge Collet: Objection overruled.

Mr. Blanton:

Q. It was not in cultivation, was it; it was being used as pasture?

A. Yes. I had a purpose in doing that. I wanted to—I was employed and couldn't make my living—I was trying to build up my farm so that when I got so that I couldn't work, I hoped that it would increase in value and I was holding it so it would take care of me when I got old. That is the reason.

Q. There were ten or fifteen acres of the land that were in cultivation?

A. No, indeed; there were only about ten or fifteen that couldn't be.

Q. I say, that was being cultivated. A. Yes.

Q. And had been for the past several years?

A. Yes, that is true.

Q. That is at the back end of the property away from the canal, where the little house was located?

A. Yes, that is right.

Q. That back end of the property where you had it in cultivation, ten or fifteen acres, was subject to considerable overflow?

A. It used to be subject years ago, but after that canal was made below my farm it very seldom was overflowed.

Mr. Blanton: That is all we care to ask Miss Callaway.

[fol. 99] Joe Schulte, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct-Examination

By Mr. Watson:

Q. State your name, Mr. Schulte.

A. Schulte, Joe.

Q. Where do you live?

A. At O'Fallon, Missouri, right now.

Q. Did you reside near the Mertia Callaway tract of land?

A. I did; the land joined.

Judge Collet (to the witness): Speak louder.

Mr. Watson:

Q. Were you a tenant of the Mertia Callaway tract?

A. I was; I and my brother.

Q. You and your brother? A. Yes.

Q. Did you sign this agreement here, Mr. Schulte; is that your signature (indicating Defendant's Exhibit 6)?

A. Yes, sir; that is it.

Q. Is that your brother's signature, do you know his signature?

A. Yes, sir; that is it.

Q. When did you surrender possession of that land?

A. I couldn't say; I couldn't say what date it was.

Q. Do you know about what date it was?

A. Well, I would have to guess at it. Sometime in November.

Q. Sometime in a month in the fall?

A. I think so. I couldn't say.

Q. In what year? A. In '40.

[fol. 100] Q. 1940? A. Yes, sir.

Mr. Watson: That is all.

Mr. Blanton: No questions.

C. H. Ewald, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct-Examination

By Mr. Watson:

Q. State your full name.

A. C. H. Ewald.

Q. Where do you reside?

A. I live in Kansas City, Missouri.

Q. By whom are you employed?

A. I am employed by the Kansas City Title Insurance Company.

Q. How long have you been employed by that company?

A. About three years.

Q. Were you in the employ of that company in the months of October, November and December, 1940?

A. Yes. Mr. Watson, I am a little hard of hearing. If you will talk louder.

Q. I will try to talk louder. And in the following months of January and February, 1941?

A. Yes, sir.

Q. Where were you during those months, where was your work?

A. Beginning sometime in the month of November, 1940, until sometime in the month of June, 1941, I was in St. Charles, Missouri.

Q. In connection with what business?

[fol. 101] A. I was in charge of the office of our company, located at St. Charles, where we did the title work in connection with the Weldon Springs Ordnance plant.

Q. Are you a member of the Bar?

A. I am, yes.

Q. Of the State of Missouri?

A. Yes; also admitted in the Federal Court.

Q. And the Federal Court?

A. Yes.

Q. I believe you stated that you were in charge of the St. Charles office, did you not?

A. That is right.

Q. Have you with you the files of your company on the Mertia Callaway transaction?

A. I have (handing document to Mr. Watson).

Q. Did you prepare a certificate of title to the Mertia Callaway land?

A. Yes; we prepared a preliminary certificate of title on that tract of land.

Q. Did you send it to the United States Government?

Mr. Blanton: I don't want to encumber the record with a lot of objections. May it be understood, Mr. Watson, that the objection we made to the option itself when it was offered, that we object to any action taken under that option, for the same reasons?

Mr. Watson: That may be understood.

Mr. Blanton: Is that agreeable to Your Honor?

Judge Collet: Yes.

[fol. 102] A. That certificate was sent to the Honorable Norman M. Littell, Attorney General, Land Division, Department of Justice, Washington, D. C.

Mr. Watson:

Q. Did you prepare a deed for the signature of Mertia Callaway?

A. I am sorry; I didn't hear you.

Q. Did you prepare a deed—I beg your pardon; I forgot. Did you prepare a deed for the signature of Mertia Callaway, purporting to convey her land to the Government?

A. We did, yes.

Q. Did Mertia Callaway come in to your office and sign that deed?

A. She did, yes, sir.

Q. Have you that deed?

A. I have that deed; I think I do. (After searching file) Yes, I have the deed (handing document to counsel)

Mr. Watson: I will ask that this deed be marked Defendant's Exhibit 7 (handing document to Mr. Blanton).

(The document indicated by counsel was thereupon marked Defendant's Exhibit 7.)

Q. Did you see Mertia Callaway sign that deed?

A. Mr. Watson, I just do not recall whether I saw her sign that deed or not. I saw practically all of them, but some of them may have been signed when I was not present, and I can't recall in this instance.

Mr. Watson: May it please the Court, could I be per-[fol. 103] mitted to call Miss Callaway at this time, just for the purpose of identifying her signature?

Judge Collet: It may not be necessary.

(To Mr. Blanton) Do you know it, Mr. Blanton?

Mr. Blanton: I don't know it, but it is acknowledged there and I suppose it was signed by her. I am not making a point of it being signed or not signed.

Mr. Watson: Then I understand that the record shows that the signature is admitted.

I now offer in evidence a deed from Mertia Callaway to the United States of America. I ask that we be permitted to substitute a copy thereof and withdraw the original, so that it may be returned to Mr. Ewald.

I also offer in evidence the acknowledgment of said deed and the Recorder's statement showing that said deed was recorded in Book 197, page 179, of the Office of the Recorder of Deeds of St. Charles County.

Mr. Blanton: I want to offer a separate objection to the recording of the deed, because there is no proof as to who had the deed recorded.

Mr. O'Bryan: The recording shows for itself; it shows upon its face that it has been duly recorded in the Recorder's Office of St. Charles County. There is no way—

Mr. Watson: I don't think it is necessary for the Court [fol. 104] to rule on that, because I think Mr. Ewald can testify to that.

Q. Who recorded this deed?
A. We did.

Judge Collet: Whom do you mean by "we"?

The Witness: The Kansas City Title Insurance Company. I don't know, if the Court please—I don't recall which one of our employees actually carried the deed to the court-house and filed it, but one of our employees carried the deed up there and filed it.

The deed from Mertia Callaway to the United States of America, last offered in evidence as Defendant's Exhibit 7, is in words and figures as follows, to-wit:

Defendant's Exhibit 7 is on file in the office of the Clerk of the Circuit Court of Appeals.

[fol. 105] By Mr. Watson:

Q. Mr. Ewald, are you familiar with the terms and provisions of the option contract?

A. I think so, yes, sir.

Q. Was there a provision in that contract to the effect that—

Mr. Blanton: The contract speaks for itself, Mr. Watson.

Mr. Watson: That is right. I withdraw that.

Q. Now, what did you do with the deed first, after Miss Callaway left it with you?

A. We made two certified copies that I certified as being complete and correct copies of the deed, including the acknowledgment, and they were sent with the preliminary certificate to Mr. Littell, of the Department of Justice, with some other papers in connection with it.

Q. Thereafter did you, or did you not, receive a letter from the War Department relative to this Callaway transaction?

A. Yes; in due time we received a letter from the War Department relative to this Callaway transaction, and a number of other transactions, all in one letter.

Mr. Watson: I now offer in evidence Defendant's Exhibit 8, being the letter which Mr. Ewald has just mentioned.

Q. Mr. Ewald, this letter contained certain enclosures, among others an opinion of the Attorney General of the [fol. 106] United States: Have you that?

A. Yes, sir.

Judge Collet: Mr. Marshal, will you announce a recess for ten minutes?

(At this point a brief recess was had, after which the hearing was resumed.)

Mr. Watson: Mr. Blanton, have you a copy of Office Order No. 75 of the Quartermaster General's Office?

(Mr. Blanton here handed to Mr. Watson a document, which was marked Defendant's Exhibit 9.)

Mr. Watson: I now offer in evidence the following document, which I will read (Reading Defendant's Exhibit 9):

"War Department
Office of The Quartermaster General
Washington

September 4, 1940.

Office Order)
No. 75)

Effective this date, Major C. J. Harrold, Q. M. C., now on duty in the Construction Division, Office of The Quar-

termaster General, is authorized to sign contracts on behalf of the United States, with the exception of such contracts as the law requires shall be signed by the Secretary of War, pertaining to the purchase or sale of real estate for the War Department, and all agreements and contracts for personal services in connection with the real estate activities of the War Department.

By order of The Quartermaster General:

(Signed) G. D. MURPHEY,
G. D. Murphey,
Lt. Col., QMC.,
Assistant."

[fol. 107] I have already introduced into evidence this letter, which I will read (Reading Defendant's Exhibit 8):

"War Department
Office of the Quartermaster General
Washington

In Reply Refer to
QM 601.1 C-RE
Weldon Spgs. Ord. Pl.,
Weldon Spgs., Mo.

January 27, 1941.

The Kansas City Title Insurance Company,
106 South Main Street,
St. Charles, Missouri.

Attention: C. H. Ewald

Dear Sir:

You will find herewith inclosed preliminary opinions of the Attorney General, together with deeds, preliminary guaranteed certificates of title, photostatic copies of option agreement, checks and other related papers covering lands sold to the United States by the following vendors:

Case No.	Vendor	No. of Acres	Amount of Check	Check No.
W 766 QM 2452	Melvin A. Schneider and Halia Schneider	32 798	$ 5,000 00	798,542
W 766 QM 2551	Frank A. Beyl and Layton Beyl	.5	2,360 60	798,540
W 766 QM 2596	Mertia Z. Callaway	90 5	10,888 20	798,541
W 766 QM 2600	Roy Long and Etna Long	109 36	9,180 00	798,537
W 766 QM 2753	Mary Wentker	112 25	9,500 00	798,538
W 766 QM 2788	O. P. Hampton and Kate G. Hampton	59 04	4,462 50	798,531
W 766 QM 2804	Andrew Mergenthal & Emma Mergenthal	1	3,728 00	798,535
W 766 QM 2813	George C. Willson and Jean H. Willson	52 11	32,000 00	798,539

It is requested that the necessary steps be taken to eliminate the objections referred to in the Attorney General's [fol. 108] letters above-mentioned, and when such action has been taken and you are in a position to issue a final certificate of title showing the vesting of a valid title in the United States of America subject only to any rights of way or easements, the inclosed checks for the balance thereof due the vendors may be paid.

Upon completion of the above action, your final certificates of title, the original recorded deeds, and other related papers should be transmitted direct to this office.

For The Quartermaster General:

Very truly yours,

(Signed) C. J. HARROLD,
C. J. Harrold,
Major, Q. M. C.,
Assistant.

5 Inclosures
#1, Opinions (8)
#2, Deeds (8)
#3, Certs. of Title (8)
#4, Cpys. Option (8)
#5, Checks (8)

Registered Mail."

I ask leave, in connection with the introduction of this document, that a copy may be substituted, and the original document withdrawn and returned to Mr. Ewald's file.

Judge Collet: Those documents will not be withdrawn until the copies are substituted?

Mr. Watson: That is correct, Your Honor.

I now offer in evidence the following document, which I will read (reading Defendant's Exhibit 10):

[fol. 109] "Office of The Attorney General
Washington, D. C.

January 15, 1941.

Honorable Henry L. Stimson,
Secretary of War,
Washington, D. C.

My dear Mr. Secretary:

An examination has been made of the title data relating to 90.5 acres of land, more or less, Tract No. 102, Weldon Springs Ordnance Plant Project in St. Charles County, Missouri. This land is to be acquired under Option No. 2596 for a consideration of $10,888.20 by authority of existing legislation. The file number of this Department is 33-26-193-120.

The land is described in the enclosed copy of the deed dated December 11, 1940 from Mertia Z. Callaway, a single person, to the United States of America.

The preliminary certificate of title, No. X-1344-126, dated as of November 28, 1940, was prepared by the Kansas City Insurance Company and is satisfactory.

The preliminary certificate and accompanying data disclose the title to be vested in Mertia Z. Callaway, subject to:

1. All taxes and assessments.

2. Rights or claims of persons in possession.

3. Mechanics' liens, if any, not shown of record.

4. Judgments, liens, and bankruptcy proceedings, if any, which may be disclosed by an examination of the records of the federal court for the district where the land lies.

5. The deed of trust shown at Item 7 of Schedule B of the preliminary certificate of title.

[fol. 110] 6. The requirement noted at Item 8 of Schedule B of the preliminary certificate of title.

7. Rights of way and easements, if any, not shown by record.

8. Cemeteries, burial grounds, church and school sites, if any, not shown of record.

According to evidence of administrative approval furnished by your Department, the land is to be acquired subject to the rights of way and easements referred to in objection 7 above which are therefore waived.

When the objections numbered 1 to 6 inclusive have been met, the deed to the United States, of which the enclosed is a copy, has been delivered, properly stamped and recorded, the purchase price has been paid, and a new certificate of title has been obtained showing the vesting of a valid title in the United States of America, and this Department has been informed in writing that cemeteries, burial grounds, church or school sites, if any, noted at objection 8 will not interfere with the contemplated use of the land the title will be approved subject to rights of way, easements, cemeteries, burial grounds, church and school sites noted at objections 7 and 8 above.

The preliminary certificate of title and related papers are enclosed.

Respectfully,

(Signed) ROBERT H. JACKSON,
Attorney General."

I will also ask leave to withdraw this document when a copy is substituted.

Judge Collet: Very well.

By Mr. Watson:

Q. Mr. Ewald, another enclosure mentioned in this letter of January 27th, 1941, is a check numbered 798,541?

A. Yes, sir.

[fol. 111] Q. Did you receive that check?

A. We did, yes, sir.

Q. And have you that check? A. I do not.

Q. What did you do with that check?

A. You mean, the ultimate disposition of the check?

Q. Yes.

A. Mr. Ewing Wright, of the Department of Justice, from Washington, called at our office in St. Charles and picked up all the checks that we had on hand, including this Mertia Callaway check.

Q. Mr. Ewald, were you given any instructions with reference to payments, by Mr. Wright?

A. I don't believe I got your question.

Q. Were you instructed to stop payments on all projected deals?

A. Yes. There was a telgeram received by Mr. McDowell—I don't remember who that telegram was from, Mr. Watson—asking that payment on all deals be held until the next day or two, when some representative of Mr. Blanton's office would call at St. Charles, and Mr. Wright, with one or two other men from Mr. Blanton's office, came there within the next day or two.

Q. And you were informed of that telegram by Mr. McDowell, or his office? A. (No audible answer)

Q. That telegram to Mr. McDowell was transmitted to you, or the substance of it?

[fol. 112] A. That is right. Mr. Bolton, I think it was, of Mr. McDowell's office, brought the telegram over and showed it to me.

Q. When Mr. Wright came did he say anything with reference to that question, as to whether—

The Witness: As to stopping payment?

Q. Yes.

A. Oh, yes; he said that all payments must be held in abeyance until further orders.

Q. And he said that he was a representative of the Attorney General's office?

A. Yes, and showed his credentials.

Q. And showed his credentials. What was the date upon which that order came?

A. I think it was February 7th.

Q. February 7th—

The Witness: 1941.

Q. After that call from Mr. Ewing Wright, did you ever receive any orders to resume payment?

A. No, sir; we did not. We couldn't handle a resumed payment unless we had some checks.

Q. And the checks were all taken away from you?

A. That is right.

Q. Did you receive any other letters from the Government with reference to this Callaway deal, other than this letter?

A. No, I don't think we did, Mr. Watson. (After examining file) No, sir.

Q. Did you receive any instructions to record this deed?

Mr. Blanton: We object to the form of that question. [fol. 113] That is rather a broad question. By whom, and when, and under what circumstances?

Mr. Watson: All right.

Q. Did you have any instructions from the War Department to record deeds?

Mr. Blanton: If he did, the instructions themselves are the best evidence of what they were.

Judge Collet: He can answer yes or no, whether he did or not.

A. Whether instructions came from the War Department, I can't say.

By Mr. Watson:

Q. What was the basis of the recordation of the deeds?

A. We were instructed to prepare title certificates and to pay the money to the landowner when we were in a position to certify that the title was vested in the Government.

Judge Collet: Mr. Blanton wants to know whether that was in writing or not.

The Witness: No, I have no letter from the War Department.

Mr. Blanton: We object, then, to any testimony along that line, what somebody else may have told him.

Mr. O'Bryan: Here it is right here, in this letter (indicating Defendant's Exhibit 8).

By Mr. Watson:

Q. Read that paragraph, Mr. Ewald.

[fol. 114] A. "It is requested"—

Mr. Blanton: If it is already in evidence, why burden the record with reading it again?

Mr. Watson: I am questioning the witness. I want to bring out this fact. I would like to have the witness read the paragraph.

A. (Reading): "It is requested that the necessary steps be taken to eliminate the objections referred to in the Attorney General's letters above-mentioned, and when such action has been taken and you are in a position to issue a final certificate of title showing the vesting of a valid title in the United States of America subject only to any rights of way or easements, the inclosed checks for the balance thereof due the vendors may be paid."

Judge Collet: Objection sustained. That does not have any bearing upon the recording of the deed.

Mr. O'Bryan: I think in governmental procedure, knowing what these title men had to know, when the Government gives these instructions they don't go into a lot of detail, but they will know—

Judge Collet: Are you asking us to take judicial notice of what was in the mind—

Mr. O'Bryan (reading from exhibit): "and when such action has been taken and you are in a position to issue a [fol. 115] final certificate of title showing the vesting of a valid title in the United States of America", and that means that the deed must be recorded, for them to issue that final certificate of title showing the deed in the United States of America. They couldn't issue the title until the deed was recorded, and that is the governmental way of saying to you "Record the deed".

Judge Collet: You can make proof of that, if you desire.

Mr. O'Bryan: It is right in there.

Judge Collet (to Mr. Watson): Proceed.

By Mr. Watson:

Q. Mr. Ewald, what is a final certificate of title?

A. A final certificate of title, as referred to in this discussion here, is a certificate showing title vested in the

United States of America, free and clear of all liens and encumbrances, subject only to rights of way or easements for rights of way, as stated in that letter.

Q. You say "showing title vested in the United States of America": Do you mean record title?

A. Absolutely, record title, and the only way such a certificate could be issued would be for a deed conveying that title to the United States of America to be filed of record.

Judge Collet: Let me ask you a question, Mr. Watson: Is all this preliminary to making proof that the deed was recorded, is that the purpose of this?

Mr. Watson: That is part of the purpose. It is also [fol. 116] the purpose, Your Honor, to show—

Judge Collet: If there is some other purpose, go ahead, but if that is the only purpose—I gathered from the statement of counsel that there was no dispute about the deed having been recorded—it occurred to me that you have wasted a lot of time proving something that there is no dispute about. If there is some other purpose, go ahead.

Mr. Watson: It is offered for the purpose of showing, not only that the deed was recorded and publicly recorded, but that the Kansas City Title Company was instructed by the Government to record the deed.

Judge Collet: All right.

Mr. Blanton: We are objecting to his construction of the instruction given, because the option which he offered required him to—

Judge Collet: The objection is not necessary, because he is merely stating the purpose of this examination.

(To Mr. Watson) You may proceed, if you have that purpose. I take it, you have not gotten through with it yet.

By Mr. Watson:

Q. At the time you were acting in a capacity, also, as a representative of Mertia Z. Callaway, were you not? You were preparing these instruments for her?

A. That is right yes, sir.

Q. And you recorded this deed for her?

[fol. 117] A. Yes, sir. We had no contract of any kind with the Government at that time, no contract.

Q. Did you consider that the Government, from this document here, that the Government desired you to record the deed and make final certificate of title?

Mr. Blanton: That is objected to, calling for the witness' conclusion.

Mr. Watson: I am trying to show why the witness acted as he did, Your Honor.

Judge Collet: That objection will be sustained. The writing shows for itself.

Mr. Watson: Mr. Ewald, did your office, in any case, pay any of these checks that were transmitted? Did you handle the conveyance—

(Here ensued private colloquy between Mr. Watson and Mr. O'Bryan.)

Mr. Watson: I will withdraw that question; that is all.

Cross-Examination.

By Mr. Blanton:

Q. Mr. Ewald, I believe you stated that Mr. Bolton, who was the representative of Mr. McDowell in the St. Charles set-up, conveyed to you information that he had received by telegram, that payment of these checks was to be held up?

A. That is right. He exhibited the telegram to me.

Q. Now, with reference to the time that Ewing Wright [fol. 118] came out and picked up the checks, which you stated was on February 7th, when did McDowell or Mr. Bolton show you this telegram?

A. I think you probably misunderstood me, Mr. Blanton. I think that telegram came on February 7th and Ewing Wright came, probably two days or three days later.

Q. You say the telegram came on February 7th?

A. That is my recollection.

Q. That is the date he showed it to you?

A. Yes; that is my recollection of it. It was on a Friday and Ewing Wright came the following Monday.

Q. And you did, pursuant to the instructions received in that telegram, not make delivery of any of the checks?

A. That is right; no other checks were delivered after the telegram was exhibited to us.

Q. But you did record this deed after that telegram?

A. That is right.

Q. Why did you do that?

A. There were four deeds—three others—that were recorded the day following. The reason for that was this: We had prepared quite a number of deeds Friday morning to be filed for record, and I gave one of the men the money to go to the post office and buy the revenue stamps. The post office didn't thave sufficient revenue stamps for all the deeds and he held four of those and the next morning, when the post office had another bunch of revenue stamps, [fol. 119] he got the revenue stamps and recorded the remaining four deeds.

Q. In other words, this Callaway deed was recorded by mistake?

A. No, I don't know if I want to say it was by mistake.

Q. It was contrary—

The Witness: It was recorded after the telegram had been exhibited to us, yes.

Q. And prior to the delivery of any money to Miss Callaway?

A. Oh, yes. The deeds always were recorded prior to the delivery of any money.

Q. Contrary to the instructions contained in the telegram?

A. The telegram said nothing about recording deeds. No money was paid out—

Q. You stated you didn't record deeds until the money was paid, did I understand you correctly?

A. We paid no money until after the deeds had been filed for record. The deeds were always filed prior to the paying of money.

Q. But not until you had the money in your hand?

A. That is correct.

Q. Your contract was with Mr. McDowell, was it not?

A. No, sir; we had no contract with McDowell.

Q. Did you make arrangements with McDowell—you never had any contract with the Government at that time?

A. We had no contract with the Government.

[fol. 120] Q. With whom did you have a contract?

A. Our contract was with the landowner. His option required him to furnish a title certificate prepared by the Kansas City Title Insurance Company.

Q. Do you know who made the arrangement with the Kansas City Title Company, a concern in Kansas City, to do this work?

A. I do not know who drew that option form, no, sir. All I know about that, Mr. Blanton, is that Mr. McDowell came into our office in Kansas City and stated that he was going to Washington to endeavor to get a contract to purchase some land in Missouri for a munitions plant, and wondered if we would be interested in doing the title work and we told him that we would. About two weeks later he came back and laid down a printed form of an option, which had our name in it as the party to do the title work.

Q. Did you have an understanding with Mr. McDowell before he went to Washington what your fee would be?

A. No, sir.

Q. You accepted the fee that was set forth in that option contract?

A. That option contract did not specify any fee for the title work, Mr. Blanton.

Q. How was the one and a half per cent. arrived at, which your company charged the landowners?

A. After the option contract was printed with our name in it, to do the title work, we went to St. Charles and checked up on the situation, and with Mr. Emmons, the [fol. 121] local abstracter, we finally made an arrangement with him whereby we leased his abstract plant for that area, and in consultation with him as to the probable amount of work necessary, the one and a half per cent. was arrived at as a reasonable fee. That was after a goodly number of the options had already been signed.

Q. In other words, these various people agreed to pay your fee without even knowing what that fee was going to amount to? A. Some of them did.

Q. Your company didn't have any facilities at all for doing this work in St. Charles? You had no set of books or any title records, did you, at the time?

A. There were no books in St. Charles County for it.

Q. The only books you used were those owned by the Emmons Abstract Company?

A. That is right. We do title insurance work in every county in the state, outside of St. Charles County.

Q. Mr. Ewald, do you know Mr. McDowell's signature?

A. I think I would, yes.

Q. Did you see Mr. McDowell frequently there about your work there, during the period of time you were there from November, 1940, to June, 1941?

A. Yes; particularly in the early part I saw him there quite frequently.

Q. I hand you an exhibit which has been marked 1001-4, and ask you if that is Mr. McDowell's signature.

A. I think it is, yes.

[fol. 122] Q. Do you know Mr. Bolton's signature?

A. I have seen it.

Q. Was Mr. Bolton office manager for Mr. McDowell?

A. That is right.

Q. He was in charge of the office while McDowell was not there? A. That is correct.

Q. I hand you a document which has been marked 1001-2 and ask you if that is Mr. Bolton's signature to that document, in your opinion.

A. I think it is, yes, sir.

Q. I likewise hand you an exhibit marked 1001-3, and will ask you if that is likewise Mr. Bolton's signature?

A. I think it is.

Mr. Blanton: I don't care to offer these at this time, but you can look at them if you want to, Sam (handing documents to Mr. Watson).

Q. Now I hand you documents which have been marked B-1, B-2, B-5, B-6, B-7, B-8, B-9, B-10, and B-11, and I will ask you if those all bear the signature of Mr. Bolton, too.

A. I think that is Mr. Bolton's signature.

Q. That is B-1 you refer to?

A. B-1, that is right. B-2, I think is Mr. Bolton's signature.

Mr. O'Bryan: Have you very many of those?

Mr. Blanton: Seven or eight of them.

[fol. 123] The Witness: B-5 is, B-6 is, B-9 is, B-10 is, B-11 is, B-8 is.

Q. I hand you now a document marked G-1, and ask you if that is Mr. McDowell's signature on the concluding page of that exhibit.

A. I think it is, Mr. Blanton. I am not certain, but I think it is.

Q. I hand you Exhibit G-2, and particularly the second page thereof, and ask you if that likewise is Mr. McDowell's signature. A. I think it is.

Q. Mr. Ewald, do you remember if there was a tract out there known as the Agnes Kolodsey tract, included in this area?

A. Yes, I know there was such a tract. I don't know anything about it, other than by name.

Q. You are familiar with some of the transactions in connection with that tract, are you not?

A. Well, as far as the title work is concerned, yes.

Q. I will ask you if you held a conference with Mrs. Pollardly, the sister of Miss Kolodsey, concerning that tract.

A. That is right. She came to our office, I think, several times.

Q. She executed an option, did she not, by virtue of a power of attorney from her sister?

Mr. Watson: That is objected to on the same ground that I have before objected to the previous inquiries as to other deals.

[fol. 124] Judge Collet: It does not seem to have any relation to this case.

Mr. Blanton: This is another circumstance, to show that here we have a piece of ground that McDowell, in November, sends in a letter to the Attorney General advising—or to the War Department, I should say, advising that he recommends an acceptance of an option on the basis of $4,500, which he considers the reasonable value of the property, and two months later he sends in an option for the same piece of ground, for the sum of ten thousand dollars, which he likewise says is the fair and reasonable value of the land. It is a circumstance to show the course of conduct of McDowell in handling these options.

Mr. Watson: That is objected to on the ground that it is immaterial. McDowell may change his mind. What Mc-

Dowell thought about whether it was a fair and reasonable value is entirely irrelevant and immaterial, and what he represented to the Government about the fair and reasonable value is entirely irrelevant and immaterial.

Judge Collet: Those objections are overruled.

(Last previous question read.)

A. That is my recollection, yes.

Mr. Blanton: When she came in to have you folks prepare the deed on the basis of $4,500, you asked to see the power of attorney, did you not?

[fol. 125] A. Yes. When she came in to sign the deed I wanted to see the power of attorney and I discovered in the course of conversation with her that her sister did not know anything about this proposed sale. The power of attorney was some five or six years old, as I recall.

Q. Four and a half, to be exact.

A. I don't remember, Mr. Blanton.

Q. Is this the power of attorney to which you refer, that was attached to this option, which seems to have been dated the 18th of March, 1936?

A. That probably is, yes. It was a number of years old. I objected to her signing that without verifying that power of attorney, and she then stated that her sister wouldn't sign any deed; here sister wouldn't stand for a price like that. I said if her sister objected we had better find it out now. Then I got her sister's address and sent to the sister a deed for signature, with a letter of explanation, which was returned, refusing to sign, and saying she would not sell for less than ten thousand dollars.

Q. Did you have any conversation with McDowell then, after that letter came back, about the execution or procuring of a new option?

A. Yes, I think I discussed that with McDowell, and probably with Bolton, both.

Q. Do you remember what McDowell said about that, or what Bolton said about getting a new option for ten thousand?

[fol. 126] A. Yes; I recall that Mr. McDowell made a statement something like this: That this was one of the

earlier options that was signed and that in the light of payments made to other surrounding property owners, this property was worth more than the price set forth in the option, and he said—

Q. Set forth in the original option, $4,500?

A. The original option, yes, sir, and he said something to the effect that it is unfortunate that a person who was willing to cooperate just couldn't get as much as some who were not so willing to cooperate and crying for a higher price. I don't recall the exact words, but something along that line.

Q. These two options covered the same identical land, did they not?

A. Oh, yes. It is my—well, I know that Mr. McDowell drew up another option and that may have been sent to the sister down in Texas and signed by her. I am not so sure. I knew he drew up another option and sent it to Washington, which was rejected.

Q. Does this refresh your recollection about the date of it (handing paper to the witness)?

Was that first option signed about November 16, 1940?

A. I know there were a lot of them signed. There were—yes, sure; that would not be the second one; that would be the first one.

Q. Do you know about when the second one was [fol. 127] signed? When was this conversation with McDowell?

A. I would say it was somewhere in January or the early part of February, Mr. Blanton, of the following year, '41.

Q. In other words, about six or seven weeks later?

A. Yes; seven, eight or nine weeks. Somewhere along in there. I don't know.

Q. Was there anything out there that would make the land increase in value from $4,500 to $10,000 in those six or seven weeks?

A. That is something I know nothing about.

Mr. Blanton: I think that is all, Your Honor.

The Witness: Might I make this additional statement?

Q. Yes.

The Witness: We had nothing to do, our company had nothing to do, and I had nothing to do, with procuring any options.

Redirect Examination

By Mr. Watson:

Q. Mr. Ewald, did your company disburse any money for land that was paid for?

A. Oh, yes; we disbursed in one hundred and twenty-one cases.

Q. Now I am not asking you with reference to any specific case, but I am asking you to relate to the Court the practice followed by you in the course of disbursements, taking it up from the beginning to the end.

[fol. 128] A. You mean, from the very beginning of the transaction?

Q. Yes.

A. When Mr. McDowell's organization procured an option—by that, I mean when the landowner had signed an option, that information was transmitted to us, to the abstract office. The abstract office then immediately prepared a—what they call a construction sheet, a chain of title. It so happens that Mr. Emmons always kept a carbon copy of every abstract that he made. So, whenever he had a carbon copy of the abstract he just started his construction sheet with the date of the last certificate on his copy of the abstract. Where there were abstracts that were available, the construction sheet was started with the date of the last certificate on that abstract, and where there were no abstracts, the construction sheet started with the Government, on down. Then we took those construction sheets and went direct to the courthouse and examined the records right from the books in the Office of the Recorder. After the examiner had completed his examination he prepared what they called an opinion on the title. That opinion was then taken and reviewed in our office—I did all of that myself. Certain matters were eliminated, that we thought safely could be eliminated, and from that certificate then was prepared the preliminary title certificate that went in to Washington. After that was done—I mean, after the preliminary cer-
[fol. 129] tificate was prepared, then the deed was drawn. Then the landowner was notified to come in and sign the

deed. After the deed was executed then two copies —I had to make two certified copies of each deed, including the acknowledgment—let me back up a little and say, in the course of the proceeding we received a photostatic copy of the option showing acceptance of the Government. That photostatic copy of the option, with a plan that the examiner prepared of the land, all was submitted to the Attorney General's office in Washington.

Then, in the course of three, four or five weeks, we received back from the War Department a letter enclosing checks, and a letter from the Attorney General on each tract, and returning one copy of the deed that we had sent in, returning our preliminary title certificate, and the photostatic copy of the option.

During the interval, we had two men that were working on curative matters, so that we tried to have the titles in shape to pay out at the time the check came in. When the checks were received in our office the first thing we did was to pull out those files on which checks had been received, carefully go through and see what requirements there remained to be taken before it could be paid out. As soon as the deed was so that we could safely pay out, we then notified the landowner to come in and im- [fol. 130] mediately filed his deed for record, so that his deed would be on record, and enable us to check the length of time to see that nothing had intervened which might be a lien before we had disbursed the money. When the checks were received we placed—we rented a safety deposit box in the First National Bank at St. Charles, and we immediately took the checks and put them in the safety deposit box. When the landowner came in to get his money we took the landowner and went over to the First National Bank, had the landowner endorse the Government check, which was made out in favor of the landowner; we had him endorse the check to the First National Bank and the First National Bank, in turn, split that up so that the taxes could be paid and any deed of trust that might be against the land could be paid—any encumbrance that had to be paid off. Some of them had judgments that had to be paid, and Mr. McDowell's commission, and we advanced the revenue stamps for the deeds and the filing

fee for the deeds, which the option provided was to be paid by the landowner. That was deducted, and our title fee was deducted, and the landowner was given a check for the balance, and a settlement sheet was prepared and sent to the Government in duplicate, with our final title certificate and with the recorded deed.

Q. Do you know whether this system had been used by the Government before, and by title companies doing [fol. 131] like work for the Government?

A. Now, that is the same system that we used in doing the title work for the Lake City plant at Kansas City.

Mr. Blanton: We object to what may have been done under some different contract, on some entirely different project, different title company, and particularly this witness putting his construction on what somebody else is doing.

The Witness: I may say this, if you refer to the filing of the deed and the paying out of the money, that is a universal custom in our company wherever we act as escrow agents.

Mr. Blanton: I object to his universal custom.

Judge Collet: That objection is sustained.

Mr. Blanton: May I have a ruling on the other objection I made?

Judge Collet: I expect the witness' construction of similarity of procedure would be his own opinion and is not admissible.

The Witness: The option required that.

Mr. Blanton: We object to what the option required. It speaks for itself, rather than this witness' construction of what it required.

Judge Collet: Do you have any further questions?

Mr. Watson: That is all.

The Witness: There is one question I would like to [fol. 132] ask the Court with reference to these exhibits. How shall a copy be made; who is going to make a copy, so I can withdraw them?

Judge Collet: Your attorney will advise you about that, or, rather, Mr. Watson is not your attorney, but he has asked you to produce these papers.

Mr. Watson: I want to ask the witness another question.

Q. Mr. Ewald, you testified a while ago that you made disbursements—

The Witness: Talk louder.

Q. You testified that you made a number of disbursements? A. That is right.

Q. Do you know what the gross amount you paid out amounted to?

A. It was in excess of a million dollars, but I can't tell you the exact figure.

Mr. Watson: That is all.

[fol. 133] Colonel Carl R. Dutton, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct Examination.

By Mr. Watson:

Q. Will you state your full name and title, Colonel?

A. Carl R. Dutton; Colonel of Ordnance.

Q. What is your present line of duty, Colonel?

A. I am Commanding Officer of the Weldon Springs Ordnance Plant.

Q. How long have you been Commanding Officer of that Ordnance Plant?

A. From November 13, 1940.

Q. When did you arrive on the scene of the Weldon Springs Ordnance Plant?

A. November 13, 1940.

Q. Have you any written orders in connection with your assuming command there?

A. Yes, I have, Mr. Watson. Shall I read them?

Q. Could I see them, Colonel?

A. Certainly (handing document to Mr. Watson).

Mr. Blanton: What is the purpose? Of course, these are confidential orders. I don't like to put a lot of stuff

in the record, which are confidential orders, but perhaps if you tell me what you want to show I will admit it.

Mr. Watson: I would like to show when he took possession there of the land, and what he was told was his [fol. 134] authority for taking possession. I haven't read these orders.

Mr. Blanton: Read them. You may not want to use them.

Mr. Watson: Colonel, I believe I will ask you to read that order.

Mr. Blanton: You mean, read it in the record, or do you mean just to read it—

(After examining document) I have no objection to that.

A. (Reading): "Special Orders

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War Department
Washington, 2 Nov. 1940

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54. Captain Carl R. Dutton, Ordnance Department, is relieved from assignment and duty at Picatinny Arsenal, Dover, New Jersey, is assigned to Weldon Springs Ordnance Works, Weldon Springs, Missouri, and will proceed to that station and report for duty and by letter to the Chief of Ordnance. The travel directed is necessary in the military service. FD 1420 P 1-0620, 80-0600 A 0410-01. If the travel is performed by privately owned automobile detached service for four days is authorized. By direction of the President, Captain Carl R. Dutton, Ordnance Department, is excepted from the provisions of the National Defense Act requiring duty with troops of one or more of the combatant arms of the Army, while on duty at Weldon Springs Ordnance Works, Weldon Springs, Missouri.

[fol. 135] By order of the Secretary of War:

G. C. MARSHALL,
Chief of Staff."

By Mr. Watson:

Q. Did you have any other orders, Colonel, with reference to your duties, and have you them with you, if you had?

A. No. This is the only written order that I had on November 13th, when I reported at Weldon Springs. I had, however, been with the Chief of Ordnance Office in Washington, D. C., for twenty days, and had received verbal instructions as to my mission at Weldon Springs.

Q. What were those instructions, so far as concerns the taking of possession of the area at Weldon Springs?

A. The Chief of Ordnance, or, rather, the Ordnance Department directed by the Chief of Ordnance, is not responsible for the acquisition of land. The acquisition of land is a function of the Quartermaster General, Mr. Watson, we taking over only after the land has been acquired. The Chief of Ordnance is responsible for design, procurement, manufacture, and distribution, storage, and so forth, of munitions, and under that direction the manufacture of TNT and DNT is carried out.

Q When you arrived at Weldon Springs, where did you first establish your office?

A. On November 13 there was a conference of a number of the officials of the contractors involved, who were [fol. 136] building the plant, at the Howell Consolidated High School, No. 2, and it was agreed that the temporary office would be established at the Miller School, at the junction of Route 94 and 61, Mr. McDowell making the necessary arrangement with the Boards of Education involved, and a temporary office was established at the Miller School.

Q. That office was established at the Miller School, you say, pursuant to necessary arrangements made by Mr. McDowell with the School Board?

A. That is correct.

Q. Did you place guards around that area, Colonel?

A. On November 26, we hired the first guard, and one guard per day for a period thereafter. The purpose of the guards, of course, is to fulfill the responsibility of the Commanding Officer for the protection of Government property, manufacturing equipment, which had arrived shortly after my arrival.

Q. Where was that manufacturing equipment placed?

A. It was sent to the siding at Hamburg and stored there for a short period, and ultimately brought up to the vicinity of Toonerville.

Q. When did you commence construction there, Colonel?

A. We started almost immediately, Mr. Watson, to build the siding from the M. K. & T. Railroad and to build [fol. 137] a temporary office up near the Howell High School.

Q. Would you say that was in the month of November, that you did that?

A. *Or early in December.*

Q. Was that in the year of 1940?

A. That was 1940, yes, sir.

Q. Did you, or did you not, place guards at the roads entering the area? A. I did.

Q. About when did you place those guards there?

A. Toward the end of November, 1940.

Q. Did you stop traffic in and out of the area, except by pass granted by your authority?

A. It became necessary to control the traffic, Mr. Watson. A great many sight-seers came out, especially on Sundays. Nobody was stopped who lived in the area or on the opposite side. We hired local guards, local men, who knew those who were living in the area and those who were not, and they were directed to control the traffic.

Q. Did you not issue passes to those persons who were in the area?

A. That is right, passes were issued.

Q. With the presentation of that pass, they were permitted while they remained on the land, to pass back and forth? A. Yes.

Q. But they were stopped by the guards when they approached the entrance? A. That is right.

[fol. 138] Q. And asked to show their pass? A. Yes.

Q. Now, were there some houses burned or destroyed, or wrecked or moved, in that area, soon after you came there? A. Yes; there were several.

Q. About when was that done?

A. Early in January, 1941, and subsequently.

Q. Now, had arrangements been made that entitled you to burn those houses?

Mr. Blanton: I think that calls for a conclusion of the witness. I think he should say what was said and done, and by whom.

Mr. Watson: What was your authority for burning the houses, Colonel?

A. It became necessary to build a TNT plant. We had a great—several million dollars of Government equipment, which would easily be destroyed by a general conflagration. Therefore, when Mr. McDowell advised that the Government could take possession—

Mr. Blanton: That is what I thought, and we are object to whatever Mr. McDowell may have said about what could be done or could not be done, as not being binding on the Government.

Mr. Watson: Your Honor, I think that is pertinent, because it has been shown in evidence here that Mr. McDowell was—

Judge Collet: He may finish his statement, subject to [fol. 139] the objection.

A. (Continuing) It became necessary to eliminate a great many shacks which were fire hazards, and to get them out of the way of the construction.

By Mr. Watson:

Q. Did you build a fence around that area, Colonel?

A. Yes.

Q. And when did you build that fence?

A. We started that in January, also.

Q. And about when did you complete it?

A. The complete encircling of the area was delayed for approximately six months, but the main fence along Highway 61 was finished in three weeks. There was some question as to the type of fence to go in the rear of the area.

Q. When you came to Weldon Springs, did you have any order as to whom you were to report to and discuss the matter of possession with, the taking of possession of this land?

A. No. However, at the conference which I mentioned, of November 13th, I met Mr. McDowell, and I reported to the Chief of Ordnance by long distance telephone, and also

by letter, to confirm the fact that he was assigned the job of land acquisition for the Quartermaster General.

Q. Did the Chief of Ordnance tell you anything about McDowell's authority out there?

A. Yes. The Chief of Ordnance's Office advised me—

Mr. Blanton: Of course, Your Honor, Colonel Dutton [fol. 140] just testified that the Ordnance Department was not in charge of the acquisition of the property, and I don't think the Government would be bound by what the Chief of Ordnance said—

Judge Collet: It would probably be hearsay if they were not in charge. In other words, if the Ordnance Department was not in charge, the only thing the Ordnance Department might tell Colonel Dutton would be what the Quartermaster Department told the Ordnance Department. Do you understand what I have in mind?

Mr. Watson: I don't think that is necessarily in the class of hearsay.

Judge Collet: We won't argue the hearsay question; I am sure about that, but if there were some different arrangement than that—

The Witness: As a matter of fact, that is exactly it. The Ordnance Office told me what the Quartermaster General's people told them, and I was advised—

Mr. Blanton: That is what we are objecting to, Colonel, what you were advised by somebody else.

Judge Collet: I think that is objectionable.

Mr. Watson: The Ordnance Department selected the site first, designated the place. The Ordnance Department told the Quartermaster's Department, "You get that site". The Quartermaster Department reports back, "We have acquired the site. We are ready for you to move in and go to work." I think all of that evidence between the [fol. 141] Ordnance Department and the Quartermaster Department is admissible here. I think his testimony is competent to show that he was sent out here for the purpose of taking over that land. McDowell had certain duties to perform, that were delegated to him by—

Mr. Blanton: If it will save time, I will admit the Government took possession of the land out there along about the time Colonel Dutton arrived. We think the valuation ought to be fixed as of that date.

Mr. O'Bryan: Will you also admit that Colonel Campbell, General Campbell, is the man that selected and designated the Weldon Springs area for the TNT project?

Mr. Blanton: I don't know anything about that. You just offered an order of the President that shows that.

Mr. O'Bryan: The President selected it by writing; the President only acted in selecting the site, in writing, and then it was the duty of his subordinates in the War Department to carry his order into execution.

Mr. Blanton: I can't make that admission, because I don't know anything about it.

Judge Collet: It is time to suspend court.

Mr. Blanton: As an accommodation to Colonel Dutton, he has been ordered to report to another post of duty on the first of the month. That is day after tomorrow. If [fol. 142] these gentlemen can finish with him very shortly—I don't intend to ask him anything so far—that will permit the Colonel to go on.

Judge Collet: I am glad you mentioned it.

By Mr. Watson:

Q. Colonel, there are a great many men employed in that Ordnance Plant, are there not?

A. Yes, sir.

Q. Has there been any extensive housing arrangement in the near vicinity of that plant; has the Government built any number of houses, or has anyone else built any large number of houses?

A. There is a housing project, Government housing project, in St. Charles, about twelve miles away. There is also a trailer camp project in Wentzville, about nine miles away.

Q. Do you know whether or not it is true that a great many of those people that work in that plant commute back and forth?

Mr. Blanton: We admit that they do, Mr. Watson.

Mr. Watson: You admit they do?

Mr. Blanton: Yes, sir.

Mr. Watson: That is all.

Mr. O'Bryan: You admit there are several buses that go every morning from the Delmar Loop, several from Wellston—

Mr. Blanton: No; I don't know. I don't think it makes [fol. 143] any difference whether they do or not. I am not objecting to it as immaterial, but I don't know that.

Mr. O'Bryan: I want to show that people come from here, having had a place to live—

Mr. Blanton: I think the reasons are beside the question. It was selected by the Secretary of War, and that is sufficient.

Judge Collet: Have you any questions?

Mr. Blanton: No, we have no questions to ask Colonel Dutton.

May he be excused, Mr. Watson?

Mr. Watson: Yes, he may be excused.

Judge Collet: This hearing will be suspended until ten o'clock tomorrow morning. I think Judge Davis has a matter to announce.

Judge Davis: You may announce adjournment of court until half past nine, but this trial will start at ten o'clock A. M.

At this point, at five o'clock P. M., an adjournment was had until March 31, 1942, at ten o'clock A. M.

[fol. 144] Met, pursuant to adjournment as above, on March 31, 1942, at ten o'clock A. M.

Present: Same parties as heretofore.

Judge Davis: You may continue with the case on trial.

Mr. Watson: Defendant rests, Your Honor.

Defendant Rests.

(Testimony for Plaintiff in Rebuttal.)

And thereupon the Government, to further sustain the issues on its behalf, offered the following evidence in rebuttal:

George H. Williams, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please, Senator.

A. George H. Williams.

Q. By profession, I believe, you are a practicing attorney and have been for how many years, Senator?

A. Over forty.

Q. You have your office here in St. Louis?

A. I have.

Q. I believe, among other positions, you have held that of United States Senator from the State of Missouri?

[fol. 145] A. I have.

Q. Senator, I will ask you if you know Mr. R. Newton McDowell. A. I do.

Q. How long have you known Mr. McDowell, Senator?

A. I don't know; a good many years—maybe fifteen or maybe more or maybe less.

Q. I will ask you if you own any property out in St. Charles County.

A. I do.

Q. Where is your property located with respect to the Weldon Springs area?

A. It is south of it some, I should say, four or four and a half miles from the southern boundary of the area.

Q. Senator, I will ask you if about the time that this property that is now located in what is known as the Weldon Springs area was selected by the Government, you had a telephone conversation with Mr. R. Newton McDowell.

A. I did.

Q. About when did that conversation occur, Senator?
A. That was in the late fall of 1940.
Q. I wish you would state what was said during the course of that conversation.

Mr. Watson: Now, if Your Honor please, I object to any telephone conversation that Senator Williams had with Mr. McDowell, if the purpose is to establish a claim [fol. 146] of fraud in this proceeding, on the ground that this, being a common law action, a condemnation proceeding, fraud is an improper consideration in this case, and the prayer in plaintiff's petition for rescission of the contract, being a prayer for an equitable remedy, it is improper to consider the question of fraud.

Judge Collet: Indicate the general purport of the subject of the conversation, Mr. Blanton.

Mr. Blanton: The purport of the conversation was that Mr. McDowell stated that he had been employed to purchase this twenty thousand acres of land out there in the area—

Judge Collet: It was connected with the acquisition, concerned with the acquisition of this property?

Mr. Blanton: Yes, Your Honor.

Judge Collet: The objection will be overruled.

Mr. Blanton (to the witness): The Court says you may answer, Senator.

A. Mr. McDowell called me up over the telephone. I recognized his voice. He said he was at some West End Hotel, either the Park Plaza or the Chase—I have forgotten now which; I believe he said the Park Plaza. He said he had just come to town and was about to organize a force out at St. Charles for the acquisition of a large body of land in the Weldon Springs area. I think he said just [fol. 147] across the Missouri river from the Daniel Boone bridge.

He said he understood I was very much opposed to that movement, and would like to talk to me about it, to find out what my position was. He stated that he was operating under a contract that he had made with the War Depart-

ment, that he was the official representative of the War Department, and he gave himself some title. If I were reminded of it, I would know whether that was the title he gave himself. I think it was on his stationery. I believe it was not in the option agreement, in the form which I saw, but it was some official title strange to me. I didn't know of any such title under Federal law.

He said that he had been employed by the War Department to acquire a large body of land there—probably it amounted to twenty thousand acres. I asked him if he had a copy of his contract with the Government. He said he did. I told him I would like to see it. I asked him what its general purport was. He told me that under this contract he would receive a five per cent commission from the owners for the sale of their land to the Government.

I told him that he couldn't have a contract like that. I never heard of such a contract. It couldn't be possible that he could be receiving a commission from people who were being forced to sell their property, he representing the [fol. 148] Government. That that was an unconscionable contract; I never heard of such a one.

He said it had been approved by the Attorney General of the United States. I told him I doubted that very much; I thought Mr. Jackson was a better lawyer than that, but he said he had received it from the War Department and was proceeding under it. I told him he had better be very careful, that he might find himself adding his commission to the price of the land and returning a—

Mr. Watson: I object to that testimony, Your Honor, on the ground that it is irrelevant and immaterial, and has no relation to the question of fraud. It doesn't establish fraud.

Judge Collet: Overruled.

A. (Continuing) That if he did that and received a commission on his commission, that he would be defrauding the Government and liable to criminal process.

He asked me if I knew of Captain Birch Mahaffey, who had some land in the area. I told him I did, and he said

he expected to see me soon, or something to that effect. I think that is about the sum total.

Mr. Blanton:

Q. Senator, in connection with that conversation, when you mentioned to him that if he was not careful he would find himself adding this five per cent. commission to what [fol. 149] the property owner wanted, did he make any statement that that was what he intended to do, that he was going to add this commission?

Mr. O'Bryan: We object to counsel leading the witness.

Judge Collet: Overruled.

A. Yes; he stated that was what he proposed to do.

Mr. Blanton:

Q. Now, Senator, I will ask you if, following that conversation you had with Mr. McDowell over the telephone, that you stated you thought the call was made from the Park Plaza Hotel, I will ask you if you attended a meeting attended by the landowners and addressed by Mr. McDowell and other parties, out at the Howell School.

A. Yes, I attended such a meeting.

Q. I will ask you about how many landowners were present at that time.

A. I don't know—

Mr. Watson: I object to any evidence as to that meeting. It is entirely irrelevant and immaterial to the issues in this proceeding.

Judge Collet: Overruled.

A. I should say there were between seven hundred and fifty and a thousand people present. I don't know how many of them owned land. I was present, and I didn't own any land in the area.

[fol. 150] Mr. Blanton:

Q. I will ask you if there were attorneys who were representing, or purporting to represent, some of the property owners also present.

A. Yes. I saw Mr. Watson, Mr. Gentry—I think Mr. Gentry was present with some of his clients from Howell. Mr. Ford Thompson—

Q. Mr. Joe Wentger?

A. Mr. Wentger, Mr. George Willson, and there were a large number of people present—Mr. Earl Sutton, Bob Langenbacher.

Q. He was County Agent?

A. County Farm Agent. There were lots of people there.

Q. I will ask you if during that mass meeting Mr. McDowell made any statement about how this five per cent. commission was to be handled.

Mr. Watson: That is objected to for the same reason. It is entirely irrelevant and immaterial.

Judge Collet: Overruled.

A. Yes.

Mr. Blanton:

Q. You may state what occurred in connection with that, if you will, please, sir.

A. Well, it was a long meeting. There was a good deal of talking. A great many questions were asked from the crowd of persons present, who were seeking information. Mr. McDowell spoke maybe two or three times. He was questioned by me and by Mr. Willson, and I think by Mr. Ford Thompson, as to his statement that he intended [fol. 151] to include his commission in the purchase price, and his statement that such was his intention. I told him, in the presence of this crowd, that I didn't think I had ever seen a person who needed a criminal lawyer more than he—

Mr. O'Bryan: I object to all of that and move that it be stricken out, because it has no relevancy to any of the issues in this case.

Judge Collet: Overruled.

A. (Continuing) And I urged the people present to beware of any such situation, and to be sure not to sign a contract like that, because if they did they would become involved with Mr. McDowell in a conspiracy to defraud the Government and I hoped that no person present would make such a contract.

Mr. Blanton:

Q. Senator, you stated that during your conversation with McDowell over the telephone when he first called you, that he mentioned that he expected to approach Mr. Birch Mahaffey, who, I believe, you referred to as Captain Mahaffey?

A. Well, he is a captain.

Q. Senator, I will ask if following that conversation you were exhibited a letter which Mr. McDowell is purported to have written to Mr. Mahaffey about his holdings out there in that area.

A. Mr. Mahaffey sent me some correspondence between him and McDowell.

[fol. 152] Mr. Blanton: Would you like to see this, Sam?

Mr. Watson: I would like to see the letter, yes (examining letter).

Mr. Blanton:

Q. I hand you a photostatic copy of what purports to be a letter, which has been marked Government's Exhibit 3, and I will ask you if that purports to be a true copy, as you recall the contents of that letter.

A. Understanding that it is a copy of a copy—

Q. That is what I understand, but I want you to read the body of it. I have subpoenaed Captain Mahaffey to bring the original letter, if it is available.

A. This is the letter he sent me, a copy of it; that is, Mahaffey sent me.

Q. I will ask you if this statement that you say Mr. McDowell made in the presence of the mass meeting out there at the Howell School, as to how he was to handle this five per cent., was made more than once.

A. Yes; it was made two or three times.

Q. Just again, what was that statement, please?

A. The statement was that he intended, or was willing to add the commission of five per cent which he would receive to the purchase price and include it in the amount to be received from the Government.

Mr. Blanton: Take the witness.

[fol. 153] Cross-Examination.

By Mr. O'Bryan:

Q. Senator, how many acres are in that farm of yours?

A. I don't know, Mr. O'Bryan—

Q. Well, about.

A. I should say between eight hundred and a thousand acres.

Q. A big old Missouri River bottom farm?

A. That is right.

Q. You were raised at , in Missouri, south of the river?

A. Yes, sir.

Q. You are kind of a farmer yourself?

A. I have been for a good many years; more of a farmer than a lawyer, I sometimes think.

Q. You practice law to keep up the farm, most of the time?

A. Well, the farm does pretty well.

Q. Does it? A. Yes.

Q. Senator, how far is that farm—before they built this TNT plant there and put up that fence, and pulled up those groves, how did you travel going from St. Louis to the farm?

A. Travelled Highway 94—I don't know whether the Court knows where the Miller School is. The Miller School is at the junction of 94 and what we call the new 40. New 40 is the 40 that runs from Chesterfield over the Daniel Boone Bridge to Wentzville, and takes the place of what we call the old 40, which runs from Wentzville to St. [fol. 154] Charles. The distance from there to my farm is about eleven miles. The distance now is about—I think it is about seventeen miles further.

Q. When you go down to that farm now—

The Witness: Over a bad road.

Q. You have to go over a pretty bad road?

A. The worst you ever saw.

Q. You did have a nice road up there at that school house until they fenced off that road?

A. That is right. That is a great grievance.

Q. The greatest grievance you had about this whole transaction was when you found out the Government was not going to take your farm and let—

A. By no means; by no means. I was very glad that the Government didn't take my place.

Q. But it did inconvenience you a great deal?

A. Very much.

Q. Was Miss Callaway, the defendant in this case, at that meeting, or do you know—do you know her?

A. I don't believe I know Miss Callaway.

Q. You wouldn't know whether she was there or not?

A. No, I wouldn't.

Mr. O'Bryan: That is all.

Redirect Examination.

By Mr. Blanton:

Q. I believe you said her lawyer, Mr. Watson, was [fol. 155] there, did you not?

A. I think Mr. Watson was present.

Q. That is, Mr. Sam Watson?

A. That gentleman there (indicating).

Mr. O'Bryan: Don't get the two Watsons mixed.

Mr. Blanton: He is very good.

The Witness: I know he is one of the Watson boys.

Mr. Blanton: May the Senator be excused?

Mr. O'Bryan: Yes.

Mr. Blanton: Thank you for coming over. I am sorry to have inconvenienced you.

Robert A. Langenbacher, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please, sir.

A. Robert A. Langenbacher.

Q. You are County Farm Agent for St. Charles County, are you? A. Yes.

Q. How long have you been so employed?

A. Nineteen years.

Q. Nineteen years in that one county?

A. Yes.

Q. I will ask you if you are familiar with the area [fol. 156] known as the Weldon Springs area, which has been taken over by the Government for the building of the TNT and DNT plant.

A. Yes.

Q. Did you own any land in that area yourself?

A. Yes. Mr. Blanton, the tract of land that I own was not in the area; it was immediately adjoining the area on the north, but it was not immediately in the area.

Q. In other words, it has not either been purchased or condemned by the Government? A. No.

Q. But you own land in that vicinity?

A. In that vicinity.

Q. Now, I will ask you, Mr. Langenbacher, if you, among other functions that you performed, were one of a citizens' committee, consisting of Mr. Kessler, Mr. Sinock, Mr. Hackman and Mr. Miller.

A. No; I acted as an ex-officio member, meeting with that committee in the area.

Q. Did the clerical work?

A. But the committee itself was entirely within the area.

Q. I hand you a document which has been identified as G-11, which I wish you would look at if you will, please.

A. This part (indicating on exhibit)?

Q. The whole thing.

Mr. O'Bryan: Your Honor, I would like to make a request that Senator Williams remain until after this witness [fol. 157] is through. I want to propound two other cross examination questions to him.

Judge Collet: Is he still here?

Mr. O'Bryan: Yes.

Judge Collet: All right.

A. I will not take time to read this through. This is the document, however.

Mr. Blanton:

Q. Did you assist in the preparation of that document, Mr. Langenbacher? A. Yes.

Q. Sir? A. Yes, sir.

Q. Where was it prepared?

A. In the committee meeting. The basis of it was discussed in the meeting and then prepared in our office, as I remember it, and then taken back and read over with the committee members, who approved it.

Q. Did Mr. McDowell participate in the preparation of this.

A. I think not. I think Mr. McDowell merely sat in to discuss matters generally, but we did not have Mr. McDowell in on the details of this matter. This was a matter of the committee working with our Extension Service.

Q. You say he was present when the data was assembled from which this was prepared?

A. So far as questions that we thought were pertinent to the letter brought up, that is as I remember. For instance, Mr. McDowell was excused from the meeting for part of the time. At one time he came, we asked that he [fol. 158] come back in order that we might further ask questions, and then he was excused until this matter—

Q. Where this four-page letter refers to statements made to Mr. McDowell and questions asked of Mr. McDowell and answers made, this is a correct statement as to what occurred, is it, Mr. Langenbacher?

A. I am sure it is. I think so.

Q. What was done with this letter which you have identified, and which has been marked Government's Exhibit G-11?

A. That letter was mailed out, as I remember it, to all the people in that area; all the families of that area, as well as we could get the mailing list and correct same.

Q. That is, all the people who owned land in the area?

A. That is right.

Q. From what source did you obtain that list of landowners?

A. We had a fairly complete list of the landowners before this matter came up, but immediately after we learned that the area was to be acquired, this committee met and we divided the area up into districts, and committee members and others that they inquired of, named and spotted the farms on a map, and named the people that lived at those particular spots, so that this became a spot

map with this and ever name on it, and the roads all outlined, because we understood we had to contact those folks as rapidly as possible, and that was part of the program to [fol. 159] get us a complete mailing list worked up by the committee.

Q. You also had in your control the records under the Conservation Program of the Government, showing the ownership in the area?

A. Not directly under our office. That is a part of the agricultural adjustment program, where such a record was on file, and their representative, of course, is here.

Q. As county farm agent of thirty-one years experience, you practically know everybody in that area who owned the land, do you not?

A. Not quite thirty-one years; nineteen years.

Q. I misunderstood you.

A. Yes, I knew of all the people and knew the leaders and many of the others.

Q. This memorandum seems to be signed by you: You, yourself, mailed these to the various owners?

A. They were mailed out from our office.

Q. And under your supervision?

A. That is right.

Q. Mr. Langenbacher, I will ask you if you likewise were present at this Howell School mass meeting about which Senator Williams just testified. A. Yes.

Q. I will ask you what statement, if any, you heard, or what question you heard asked Mr. McDowell about these commissions and what answers he gave.

A. There was so much confusion at that meeting and [fol. 160] the heat got rather intense, and I don't remember any of the direct statements. I know that questions were asked, but as to any particular question—we had a good deal of fun that night, and I don't know that I remember all that went on at all, well enough to quote.

Q. Give us the substance of what Mr. McDowell stated as to how these commissions were to be handled.

Mr. Watson: That is objected to for the same reason, that it is irrelevant and immaterial, and has no tendency to show fraud.

Judge Collet: Overruled.

A. I am sure of this, that the question was definitely asked whether or not this five per cent was taken off the farmer's pay, or whether it was added to it, and the answer at that time, as well as a number of other times, was that it was added to the price of the land, as well as the one and one-half per cent.

Mr. Blanton:

Q. To be paid the title company?

A. To be paid the title company, was also added to the price.

Q. Did you see Senator Williams there that night?

A. Yes; very much.

Q. Do you know a couple of gentlemen named Albrecht, who owned a quarry in that area?

[fol. 161] A. Well, I have met Mr. Albrecht and have done some business with him. I don't know—I have no direct knowledge that Mr. Albrecht owns the quarry in that area. I was told that.

Q. Did you have any conversation with Mr. Albrecht about whether it had been profitable for him to operate that quarry, that being a quarry—

A. Yes, I did; that is the Weldon Springs Quarry.

Q. I believe Mr. McDowell was at one time interested in that?

Mr. O'Bryan: That is objected to. I don't think that is pertinent.

Mr. Blanton: This is going to be pertinent when I put Mr. Albrecht on the witness-stand. I am asking it a little bit out of order, but I will connect it up when I put Mr. Albrecht on the stand.

Judge Collet: Very well.

Mr. Blanton (to the witness): I believe the Court says you may answer.

A. I don't know at all whether Mr. McDowell was ever interested in that quarry.

Q. I will ask you if either one of these Albrecht boys who own that quarry made a statement to you about whether it made them money, or whether they had taken [fol. 162] a beating out of handling it.

Mr. O'Bryan: This would be hearsay evidence, a statement made without the presence of the defendant in this case, a statement made between two parties, neither of said parties are either plaintiff or defendant in this case, and couldn't be binding upon the defendant in any way.

Judge Collet: I presume it is not offered for the purpose to show there was a profit made; it may be connected with other matters.

Mr. Blanton: That is correct, Your Honor.

Judge Collet: I would not be competent to prove the fact itself. He may answer the question.

A. I had occasion to go to Albrecht on another matter entirely removed from the area, and at that time he found out I was county agent of the county and asked me if I was acquainted with the Weldon Springs Quarry. I told him I was. He said, "How long have you known it?"

I said, "Nineteen years." That was just recently.

He said, "You know, we got stuck with two crushers out in that quarry." I said, "How was that?" He said, "Those crushers were sold to the quarry and we hold the sack."

I said, "What do you mean?"

He said, "We didn't get paid." He said, "What is the matter with that quarry?"

[fol. 163] I said, "We have never been able to get a good quality of limestone out of that quarry. The average test in our office of samples runs between eighty-five and as low as sixty per cent. That is not a desirable type of agricultural limestone, and we have never approved the use of that rock except in a limited degree, subject to inspection."

He said, "What is wrong with it?"

I said, "There is two things wrong with that quarry. One is there is flint underlays the lime rock. The other is they use big power shovels to shovel it up and it is impossible to separate the good from the bad." I said, "I wouldn't give a dime for that quarry from an agricultural limestone standpoint, because it did not have any good"—

Mr. O'Bryan: We move to strike out that long answer, for the reason that it is not material and relevant to prove or disprove any issue in this case, and is shown to be absolutely hearsay conversation between two parties, neither of whom are plaintiff or defendant here.

Judge Collet: Unless some relevancy develops, the motion to strike is—

Mr. O'Bryan: I just want to keep the record straight.

Mr. Blanton: You may inquire.

Cross-Examination.

By Mr. O'Bryan:

Q. You have been county agent of St. Charles County for how many years? A. Nineteen years.

[fol. 164] Q. You know the people in the Weldon Springs TNT area? A. Quite well.

Q. You are interested in their interest, are you not?

A. Yes, sir.

Q. You went out to that meeting at that school house that night, with their interest at heart? A. Yes.

Q. You went out there to lend any aid or assistance that you could lend to them?

A. That is right.

Q. Mr. McDowell made several talks to them, you say; two or three? A. That is right.

Q. And Senator Williams made a little talk?

A. Yes.

Q. Severel others did a little talking? A. Yes.

Q. They all wanted to know—this was something new, and they wanted to know what the Government of the United States was going to do with reference to their land, didn't they? A. That is right.

Q. Mr. McDowell told them he was out there to buy the land for the Government, didn't he?

A. I don't know that he told them that he was out there to buy the land, but he left that impression with me, in his talks.

Q. He told them that he was there to take offers to purchase that land for the Government?

A. I know of no direct statement—

Q. Just what kind of a statement did he make?

[fol. 165] A. I don't know that at that meeting he made

any direct statement to them that he was out there to buy their land. There were so many statements of a similar nature made that there was no question that they understood that Mr. McDowell was the man that was there for that purpose, but as to a direct statement of the kind, if that statement was made, I don't remember it.

Q. Mr. McDowell informed them that whatever pay he received would have to be out of the price that they received from the Government, didn't he?

A. State that again.

Q. Mr. McDowell informed them that whatever pay he received for accepting these options and getting these options, would have to be paid by the landowners?

A. No; if I understand you correctly, that is not the way I understood it. I believe his statement was to the effect that his commission and the one and a half per cent. to the Kansas City Title Company was to be added to the price that they would get. We had insisted, I had told them repeatedly, and told McDowell and Bolton, that they couldn't act for those farmers without having a contract with them and they couldn't charge them commission without some agreement—we had had several rounds with them on who was paying this commission—so that the farmers understood what they were signing.

Q. Now, you—

[fol. 166] Mr. Blanton: Let him finish.

The Witness: We had—that was one of the controversies that we had, was to get a clear understanding so that we knew what the farmer should expect.

One of the particular cases that we had trouble with was that this farmer thought he was getting some figure in the neighborhood of seven thousand dollars, and when pinned down to it, he was not getting that, but he was getting five per cent. less and one and a half per cent. less, a total of six and one-half per cent. less, and we insisted on it, and I had a conference with them that night and told them we would not stand for that. The particular case happened to be a client of mine, and I insisted that that contract show what it was supposed to show, with the result—I got up the next morning and at seven o'clock went out to this man's place. Seven o'clock is a little earlier than I usually get out in the country,

but I did that to be there ahead of this man. I got out there and he had been there at five o'clock the night before, and I had a conference with him and the contract—the contract then called for a definite amount and this man understood that was five and one and a half per cent. above his contract price.

Q. The amount set out, though, in the contract, that he offered to sell it for, included the five and one and a half per cent., didn't it? A. That is right.

[fol. 167] Q. Those contracts were all printed and brought out from Washington by McDowell, and the first time you ever saw one of those contracts it was in blank and McDowell showed it to you and it had in there that five per cent. commission was to be paid to R. N. McDowell and one and a half per cent. commission paid to the Title Company?

Mr. Blanton: I know that Mr. O'Bryan doesn't intend to do it, but he has asked about six questions in one, and I object because it is multifarious.

You have to be fair to the witness. He may be able to answer one part of your question—

The Witness: I would rather answer.

Mr. O'Bryan: I withdraw the question.

Q. When did you first see one of these printed forms of this contract that Mr. McDowell had?

A. I don't know. I asked for one a number of times before I got one.

Q. You saw it before the meeting at the school house?

A. I think so.

Q. Mr. McDowell came to St. Charles and contacted you, didn't he?

A. Yes; either Mr. McDowell or Mr. Bolton. I don't remember which one it was.

Q. Directly after they got there?

A. Not immediately after, because I called up a num-

[fol. 168] ber of times trying to find out where they were, before they finally did contact me.

Q. This was all done in a very few days' time?

A. I know, but a lot of things went on there in a few days' time.

Q. What was the date of this meeting at the school house? A. I don't remember.

Q. You don't remember? A. No.

Q. It was not far from the date that Lieutenant Colonel Dutton testified yesterday, it was shortly before he came there, though, wasn't it?

A. I think so.

Q. He came there on the thirteenth. McDowell got there on the 27th day of October, didn't he?

A. I don't know when McDowell got there.

Q. All this transpired between the 27th day of October and 13th day of November, is that right?

A. If the dates are correct dates that you give me, I suppose it did.

Q. Where did you see this contract?

A. I think I saw that at McDowell's office. I called for it a number of times before I got it, and I think I finally went down and got it.

Q. You didn't call for it two or three weeks before you got it? A. I don't know how long.

Q. You saw it before the meeting at the school house? [fol. 169] A. Yes.

Q. That meeting at the school house was before Major Dutton came there?

A. Yes; I am quite sure it was.

Q. Now, that contract set out in it that McDowell was to receive a commission of five per cent. of the amount of the price that was set up in that offer to purchase, to sell that land at, didn't they?

A. I think so.

Q. Those contracts were out at the school house that night, too, were they not?

A. I presume they were. I don't know.

Q. Did you see any of them there that night?

A. I don't know.

Q. Did Senator Williams examine them that night?

A. I don't know whether he did or not.

Q. You don't remember. McDowell never deceived those people out there—

Mr. Blanton: That calls for a conclusion.

Mr. O'Bryan: Let me ask my question.

Mr. Blanton: It already calls for a conclusion.

Mr. O'Bryan: McDowell stated the absolute and positive facts to those people that night, that they were to pay the five per cent. commission out of the price that they set up in the offer to purchase?

A. I don't believe he did—I think the committee con-
[fol. 170] stantly insisted—if my memory don't fail me—the committee constantly insisted that the farmer understand the amount he was to get; not the amount he was to get out of which something else was to be paid, because that was one of the things that we had so much trouble with. We were trying to straighten out how much was this man going to get, and we insisted right down the line that that farmer understand in some way what he was to get, and not, after he got the contract, that out of this they were going to take five per cent. I don't know whether that answers the question.

Q. You placed a construction upon that contract—

Mr. Blanton: I object to counsel arguing with the witness.

Mr. O'Bryan: I am not arguing with the witness.

Judge Collet: What is the question?

By Mr. O'Bryan:

Q. You interpreted what was said up there that night, that the farmers set a price and then add the five per cent.?

A. No, the farmer wouldn't add the five per cent. The farmer set his price on his farm and whatever was added to it was added beyond his price. That farmer was interested in his price; he was not interested in the five per cent.

Q. He was interested in what he was going to get?

A. That is right.

[fol. 171] Q. All those farmers came in and said that night, "We want seven thousand dollars net", and McDowell was to get five per cent. and one and a half per cent. on top of what the farmer wanted?

A That is right

Q. That is the way you understood it?

A. That is right.

Q. Yet, you understood in those contracts, and you saw them, that the farmer set a definite price in that contract saying that the five per cent. was to be deducted and the Title Company's per cent. was to be deducted?

A. In order to be real sure of what is in that contract I would have to refresh my memory with the contract, because, as I remember it, that is the way the contract was drawn up.

Q. You spoke a while ago about this seven thousand dollar client of yours: You mean as Farm Agent, or as a lawyer? A. As a lawyer.

Q. You are a lawyer, too, are you? I will hand you here Defendant's Exhibit 5, and I want you to look at it and see if that is the form that was shown to you by McDowell or Bolton before that meeting at the school house, excepting that piece of paper is attached that has the description.

A. (After examining Exhibit 5) Yes, I think it is.

Q. That is the form? A. Yes.

Q. And that is the form they had out at the school house that night?

[fol. 172] A. I don't know that they had that at the school house, because I did not see the form that night. I presume they were there.

Q. That option, Defendant's Exhibit 5, states a price on the form of $10,888.20, and the printed form goes on to state that five per cent. is to be taken out for McDowell's commission? A. Yes.

Q. That is what you saw on there?

Mr. Blanton: He already said three times that he didn't see it there. He has said he presumed. I object to it as repetition.

Mr. O'Bryan: All right.

Q. Your land on the north side of the road was not bought and taken into this area, was it?

A. No, sir.

Q You had some land on the north side of the road adjacent this property, but it was not taken into this defense area? A. That is right.

Q Right up against it?

A. No, not right up against it; about a mile away, I judge.

Q. A mile away from the road?

A. Along the river.

Q. Where is your land located with reference to the Daniel Boone Bridge?

A. I judge it is about a mile north of that.

Q. By "Judge's Tract"?

A. I don't know where Judge's Tract is.

[fol. 173] Q. You want to tell this Court that McDowell got up and told them that they should set their price on all their land and then add five per cent. for him?

A. I don't know that McDowell told them that. We insisted that it be told to the farmers, that the farmers understand how much they were going to get for their farms, and that this five per cent. and this one and a half per cent. would be added. The thing that we were interested in was that this farmer should know what he was going to get for his farm.

When he read that contract he would know, wouldn't he?

A. I don't know.

Q. Don't it set out there —

Mr. Blanton: The contract speaks for itself, and, besides, you are arguing with the witness.

Judge Collet: Sustained.

Mr. O'Bryan: I believe that is all.

Mr. Blanton: That is all, Mr. Langenbacher.

[fol. 174] George H. Williams, Recalled, having been heretofore duly sworn and testified, resumed the stand and testified further, as follows:

Further Cross-Examination.

By Mr. O'Bryan:

Q. Senator, I have here in my hand Defendant's Exhibit 5, which is the option to purchase land, made out and executed with Mertia Callaway: I will ask you when was the first time you ever saw a copy of that.

A. This is on a piece of yellow paper. I think the first copy I ever saw was on white paper.

Q. This is a carbon copy—

A. Oh, I see. You know how the Government does, they have red, white and blue—

Q. You have been in the Senate and worked with them, and they have all kinds of different colors?

A. Especially red, white and blue.

Q. Look at that and see if you recognize the language in it that you saw on that white paper.

A. I think this is the same purport—substance. Of course, I wouldn't—it looks like the same.

Q. When did you first see one of those, Senator, to the best of your memory?

A. I was trying to think. I got a copy of one of these option agreements from Mr. George Willson, and my recol- [fol. 175] lection is that Mr. Mahaffey sent me a copy of one of these agreements in the letter he wrote me at about that time. I had some difficulty in getting it.

Q. Was that before the meeting at the school house?

A. I don't recall.

Q. You saw those out at the school house?

A. I don't remember that I did, Mr. O'Bryan.

Q. You don't recall? A. No.

Q. You don't remember what the date of that meeting at the school house was, Senator?

A. No, but I should be surprised to learn that it was prior to November 13th. You may be right about it.

Q. I think we will fill that in with somebody else.

The Witness: I think this letter that gave notice of the meeting, that you had identified by Mr. Langenbacher—

Mr. O'Bryan: Have you that date, Harry?

Mr. Blanton: I think it was about November 8th.

Mr. O'Bryan: That is all, Senator.

Mr. Blanton: We have the newspaper reporter's report in the Globe of November 9th, and that is from what I concluded it was the night before. I am advised that I am mistaken. It was reported on the seventh and the meeting was on the sixth, apparently.

Mr. O'Bryan: Thank you. We will agree upon the sixth.

[fol. 176] WILLIAM KAUT, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please, sir.

A. William Kaut.

Q. Where do you reside, and how are you employed, please, sir?

A. I live in St. Louis County, Clayton and Geyer Road, and I am with the Brown Shoe Company, St. Louis.

Q. I will ask you did you own some property in the area of Weldon Springs. A. I did.

Q. I believe you entered into a contract with either Mr. McDowell or one of his representatives?

A. That is right.

Q. For the sale of your property? A. That is right.

Q. I believe you were paid for your property?

A. Correct.

Q. I believe I asked you to bring along some documents: Do you have those documents with you, please, sir?

A. Yes (handing documents to counsel). This is the contract. That was some of my own figures there, if you want to know about those (indicating).

Q. Mr. Kaut, of what did your property out there consist, please?

[fol. 177] Mr. Watson: I object to any evidence relative to Mr. Kaut's transaction, on the ground that it is entirely irrelevant and immaterial to the Callaway case, and on the ground that Mertia Callaway was not a party to any transaction that Mr. Kaut and the Government entered into. It is irrelevant and immaterial.

Judge Collet: Overruled.

A. The property consisted of a fraction over seventy-five acres.

By Mr. Blanton:

Q. Of real estate?

A. Of real estate; a park, not a farm. We worked that for seven years to put it in that shape. The residence was a ranch type house of logs, ten rooms, air-conditioned, had

three baths, very fine baths; lavatory and toilet off the game room; slab floor all—do you want that?

Q. Not particularly.

A. Well, a ten-room house. Also a barn one hundred feet long and twenty-seven feet wide. It was all rock. The water-works there was also a rock building, with built-in laundry and shower, and also an underground room 14 by 16 for storage, with a two thousand gallon oil tank and filling station and water pipe.

Q. Did you live in your home the year round, Mr. Kaut?

A. Yes.

Q. I believe this valley where that home was located [fol. 178] was almost entirely surrounded by high hills?

A. Yes; very high hills.

Q. About how many acres were in the basin of that valley where that home was located?

A. Oh, I should judge on our part—I would say about twenty-five or thirty acres; somewhere around there.

Q. It was intersected by one or more flowing creeks, was it not? A. One creek, the little Femme Osage.

Q. You were walled in by rather steep, high, abrupt hills, which were covered with timber? A. That is right.

Q. Your also had some personal property out there, did you not, Mr. Kaut? A. In what way?

Q. In your home.

A. Oh, the home was completely furnished.

Q. You made a sale of the entire property, including the personal property, to the Government, did you?

A. Part of the personal property. That was a separate deal, however, from that contract.

Q. What value did you place on your real estate out there?

Mr. O'Bryan: We object to the value that was placed on any other property outside of what is in controversy here in the trial, the Callaway property.

Judge Collet: It is not offered for the purpose of establishing value?

Mr. Blanton: That is correct. It is offered for the purpose—

[fol. 179] Mr. O'Bryan: It is not admissible for any purpose.

Judge Collet: Overruled.

A. Replacement value.

By Mr. Blanton:

Q. You figured that at $38,500?

A. That is correct.

Q. I believe this option seems to have been signed by Mrs. R. Newton McDowell: That is the wife of Mr. McDowell?

A. That is right.

Q. And signed also by your wife and yourself?

A. That is correct.

Q. Was this property owned by the entirety?

A. Yes, by Mrs. Kaut and myself.

Q. What understanding did you have about who was to pay this five per cent. and this one and one-half per cent.? State the conversation you had over this arrangement.

A. Well, I clearly understood that the six and one-half per cent. was to be added to the option price and the Government was to pay the six and one-half per cent.

Q. You were to get net your $38,500?

A. That is correct.

Q. Did you have some discussion with the person with whom you negotiated this contract, at the time it was negotiated, to that effect?

A. Yes, I did. I questioned the fact whether the Government would take the six and one-half per cent. off the total, if the six and a half was added to the option price, and I was informed that was not the case, but after I was [fol. 180] notified to appear for the settlement they did start to deduct it off the option price, plus the six and a half.

Q. In other words, they deducted commission on commission?

A. That is right, and I was informed that I would have to straighten that out with McDowell. So, it was settled and I went to McDowell's office, but he was out of town. I haven't seen him since.

Q. What was the difference that you received by virtue of the fact that they kept not only the six and a half per cent. which was added to your $38,500, plus the six

and a half, and what you would have received had you received the $38,500 net?

A. I think it amounted—

Mr. Watson: That is objected to on the ground that it is irrelevant and immaterial.

Judge Collet: Overruled.

A. I think the actual figure—you have that paper—

Mr. Blanton: Is that what that $170 figure is?

A. $171.30 is correct.

Q. Are these figures on this blue tablet paper your figures?

A. Yes, they are my figures. They were worked out, however, with Mr. McDowell's office.

Q. If I understand it correctly, you placed a value on your real estate of $38,500? A. Correct.

Q. And insisted on being paid for the full value of your [fol. 181] real estate? A. Right.

Q. And with that they then added this six and a half per cent.? A. Correct.

Q. But when you got paid off they took six and a half, not only on the $38,500, but also on the six and a half per cent. they added to your $38,500?

A. That is right.

Q. Mr. Kaut, I notice that the option calls for $42,288.86, which seems to have been written in in ink, in figures, although the rest of the body of your option, which seems to be W 766 QM 2587 is typewritten: Who inserted those pen and ink figures? A. Can I explain that?

Q. Yes.

A. The option originally was $38,500 plus six and a half per cent., which made it $41,044.86.

Judge Collet: How much?

The Witness: $41,044.86. That is $38,500 plus six and a half per cent. This option was not ready to be sent in when the Commanding Officer appeared on the scene.

By Mr. Blanton:

Q. Captain Dutton, now Colonel Dutton?

A. Correct, and he came down to the property with Mrs. McDowell. That is how her signature happens to appear on this second option. He talked to Washington over the long distance telephone regarding an electric refrigerator and several bed-room suites and rugs and dining-room suite, because they intended to make an officers [fol. 182] club out of the property. That amounted to $1,244, which Mr. McDowell did not participate in. There was no six and a half figured on that; it was a separate item, but it was included in one figure and there was another—I think I have it right here—paper that was attached to it and sent in to Washington, showing the exact amount—I had the material, if you are interested—

Q. It was personal property located in the premises?

A. That amounted to $1,244, on which there was no commission paid at all. That was a separate item and that was paid net, without any addition added to it.

Q. But it was included in the amount of the option, which explains the discrepancy between $38,500 plus the six and a half per cent., which would total, as you stated—

A. $41—

Q. $41,044.86?

A. Of which six and a half was to be taken off the $38,500.

Q. Whereas, the option which you actually signed was $42,288.86; that is correct, is it, and that explains—

A. That $1,244, but the six and a half was paid on the $41,000 settlement.

Q. In other words, when the settlement sheet was arrived at, the six and a half per cent. was paid on the $38,500 plus the six and a half—

[fol. 183] A. Which made it $41,000 and the six and a half was deducted from the $41,000.

Q. McDowell retained, on that basis, $2,052.24, according to his settlement sheet?

A. That is correct, instead of—

Q. Who paid for these revenue stamps and the recording fee?

A. Well, it was added on there. It was originally added in the first option, the revenue stamps—six and a half per cent. on the $38,500—the revenue stamps was included—$42 and some odd cents. This is as it was worked out (indicating paper). Here it is. It was estimated at $42. I paid those—

Q. Was that $42.36 also added to the $38,500?

A. Six and a half per cent. plus $42.36 made the $41,000.

Q. So, you were getting net $38,500 and the Government was paying six and a half per cent. commission to McDowell and the Kansas City Title Company, and was also paying these revenue stamps?

Mr. Watson: That is objected to on the ground that it calls for a conclusion of the witness.

Judge Collet: Overruled.

A. That is correct.

By Mr. Blanton:

Q. Notwithstanding the option contract itself required you to furnish the revenue stamps, according to the form of the contract, did it not, Mr. Kaut?

[fol. 184] A. That was figured right in with the six and a half per cent.

Q. You had some qualms of conscience about the matter at the time you signed this, did you not?

A. That is right. I questioned whether the Government would take it off the total figure or would take six and a half off the $38,500, which was the way it was figured, but it was taken off the total figure.

Q. What did this negotiator for this land tell you when you rather questioned the propriety of doing that?

A. I asked if that was the correct way of figuring it and I was informed it was, to add six and a half to the $38,500, but after the settlement was made it was not figured that way.

Q. In other words, the Government not only paid the commission to McDowell, which the option called for your paying, but charged you $171.30 more than your understanding with him was when you signed the option?

A. That was right. That was the difference in there.

Q. I notice you have also listed on this blue pad sheet here a fee of $1.50: Was that the Recorder's fee?

A. Yes, they charged that—it appears on the last sheet (indicating).

Q. That was also included in the amount of the option you signed, was it not?

A. That is right.

[fol. 185] Q. So, the Government was paying the Recorder's fee, paying for revenue stamps on your deed, paying six and a half per cent. commission, and paying you the value that you placed on your farm?

A. According to the way—

Mr. O'Bryan: We object to this question and this answer, and to all the other answers of the witness, for the reason that it is an attempt by the District Attorney to impeach an instrument that he is introducing in this case, which is not the contract on trial and which is not between the plaintiff and the defendant in the Callaway case, and can have no bearing either material or relevant to any issue in the condemnation proceeding and the contract set up by Miss Callaway, for the enforcement of this Court.

Judge Collet: Overruled.

Mr. Blanton:

Q. When he went to figure this commission of six and a half per cent. he figured the commission not only on the value you placed on the farm, plus the six and a half, but figured commission on the revenue stamps, didn't he?

A. Yes, it worked out that way. I forget the name of the man who was here yesterday—he and another man that was in the office was the gentlemen that done the figuring.

Q. Was it Bolton?

A. No, this was figured in the office by this attorney that was on the stand yesterday, a small man with black—

[fol. 186] Q. Mr. Ewald? A. Mr. Ewald.

Q. He is the fellow that did the figuring?

A. He and one other man, that is right.

Q. Who was there representing the Government, anybody?

A. I don't think so, at that figuring.

Mr. Blanton: Your Honor, I would like to have these documents which have been identified by Mr. Kaut, identi-

fied as Government's Exhibits 4, 4-A, 4-B, 4-C and 4-D, in order that they may be identified in the record.

(The documents last mentioned were thereupon marked as requested.)

Q. Government's Exhibit 4 is a little blue memorandum sheet which you prepared, from which you figured that you lost $171.30 on account of his figuring commission on commission?

A. That is right.

Q. Government's Exhibit 4-A is the original option which was prepared, and which has the figure typewritten in, but which did not include the personal property, but did include six and a half per cent., plus the revenue stamps, plus the recording fee? A. Correct.

Q. And Exhibit 4-B is a white original option which you signed and which was carried out, and Exhibit 4-C is the yellow copy of the same contract, executed at the same time?

[fol. 187] A. That is correct.

Q. Government's Exhibit 4-D is the settlement sheet, which was figured by Mr. Ewald, who was on the stand yesterday?

A. That is correct. Ewald and one other.

Q. Somebody else there in the office with him?

A. Yes.

Q. You don't know who the other was?

A. I don't know.

Mr. Blanton: Now I would like to offer in evidence Government's Exhibits 4 through 4-D, inclusive.

Mr. Watson: I object to the acceptance in evidence of each and every one of these exhibits, on the ground that each and every one of them is entirely immaterial; not showing fraud.

I object on the further ground that they have no relationship whatever to the transaction between Mertia Callaway and the United States of America, Mertia Callaway having not been a party to the transaction evidenced by these exhibits.

Judge Collet: They are only offered, are they not, Mr. Blanton, as illustrative of the course of dealing?

Mr. Blanton: That is correct, Your Honor.

Judge Collet: They will be admitted for that purpose, only.

Government's Exhibits 4 through 4-D, inclusive, are in words and figures as follows, to-wit:

[fol. 188] U. S. exhibit 4 is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 4-A is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 4-B is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 4-C is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 4-D is on file in the office of the Clerk of the Court of Appeals.

[fol. 189] Cross-Examination.

By Mr. O'Bryan:

Q. Mr. Kaut, tell the Court where this tract of land which you owned is located with reference to Highway 40, going up from the bridge to Wentzville and with reference to where the school house was there that they opened the office in.

A. The intersection of 94, where the Miller school house is, is three and a half miles to Toonerville, one and a half miles to Howell, about a mile down the hill into the valley—I would say about six miles from new 40 and 94.

Q. South of new 40?

A. That is correct, south, and a little west.

Q. You had seventy-four acres down there?

A. Yes.

Q. How many rooms did you have in that house?

A. Ten rooms, three baths, toilet and lavatory, three-car garage.

Q. What were you using it for?

A. A residence.

Q. Used it for a residence?

A. Positively; that is the only residence I had.

Q. You had an offer to purchase it submitted to you, for this tract of ground, at about what date?

A. Well, I don't remember exactly the date.

Q. The option to purchase, which has been introduced in evidence as Government's Exhibit 4-B, is dated November 19, 1940: That is the date that you and Mrs. Kaut signed it, is it?

[fol. 190] A. That is the date. Then the option figure was turned in, I would say, about a week or maybe ten days prior to that.

Q. You turned in an option figure of $42—

A. No; $38,500.

Q. $38,500? A. That is right, and I see that I—

Q. When you signed this you turned in an option figure of $42,000? Look at that; that figure was in there when you signed it?

A. This one option, yes, but it is not the original option. The option that I dealt with Mr. McDowell was the one of $38,500, plus six and a half—

Q. Where is that option?

A. Right here. The first one which was made, which was held up by the Commanding Officer.

Q. You first offered to sell for $41—

A. No; $38,500 net.

Q. The yellow copy of the three copies, and is made out on the typewriter here for $41,044.86.

A. That is plus the six and a half.

Q. I know, but that is the amount that is recited in that option?

A. It is, but on the one I was supposed to receive—

Q. You were supposed to receive $41,000 less five per cent., weren't you?

A. $41,000 less five per cent. was the wrong figure.

Q. But that is what your option said on that, though, Mr. Kaut?

A. May I explain as I understood it?

[fol. 191] Mr. Blanton: I think you are—

Mr. O'Bryan: I am cross examining him.

Mr. Blanton: I think you are arguing with the witness.

Mr. O'Bryan: You are testifying one way and I am the other. I think that is really what this case amounts to --you get the witness to testify one way and I want him to tell the truth about it.

Judge Collet: In order that Mr. Kaut may explain his answer—

Mr. O'Bryan (to the witness): Yes, you may explain any answer you desire to explain.

A. I was asked to place a figure on my property. I understood that six and a half per cent. would be figured to cover the McDowell commission and the title. The $38,500, plus six and a half per cent., amounted to $41,044.86.

Q. You take $38,500 and you take six and a half per cent., which made the figure of $41,000?

A. That is correct.

Q. And then you submitted to the United States Government the figure, in your offer to purchase, that you desired them to pay you $41,000 plus, less five per cent. to McDowell, less the recording fee, less the stamps, less the fee to the title company; isn't that right?

A. Which was supposed to net $38,500. That was correct.

Q. But you figured that out and that was your agree-[fol. 192] ment and you signed it and offered it to the Government as the gross amount that they were to give you from which you were to pay out, or have paid out, the other amounts; is not that right?

A. I supposed when Mr. McDowell spoke to me and told me how it would be figured, and it was figured right there at the table—I supposed he knew what he was talking about. I understood that I was to receive $38,500 net. I was not supposed to pay six and a half per cent. more to McDowell and one and a half to the abstract company. That was my understanding. When the figure was sent to Washington I expected to receive only $38,500.

Q. Did you not read over that option, the wording in it? A. Yes.

Q. You have a fair education, have you not?

A. Perhaps.

Q. You know what it said? A. Yes.

Q. It said five per cent. of the $41,000, plus, to McDowell and one and a half to the title company, didn't it?

A. It said five per cent. for McDowell, but I don't think it mentions—

Q. The title is not in there, but it did say the stamps you were to pay for?

A. I don't notice that, but I followed instructions. It was figured right out for me.

Q. What you signed, though, is that instrument there?

A. The $38,500, plus six and a half, plus $42.30 for [fol. 193] stamps, total $41,044.86.

Q. Well, you submitted it on that?

A. This was then held up at Washington for Colonel Dutton; Colonel Dutton came out and went over the property.

Q. Colonel Dutton wanted your furniture?

A. They wanted three bed-room suites and rugs, electric refrigerator, stove, and dining suite.

Q. You sold that to Colonel Dutton; you didn't sell that to the Army?

A. It was sold to the Government.

Q. Who paid for it?

A. The Government paid for it.

Q. Do you remember who issued that check; some officers' club?

A. It was handled over the telephone and was covered by wire from Washington, as I understood that message, to purchase the property.

Q. Who gave you the check?

A. At the same time I received the check for the property. It was all included in one check.

Q. The title company gave you the entire amount?

A. The title company gave me the entire amount, the property, plus $1,244.00, on which no interest was charged, or no commission.

Q. No commission was charged on the personal property?

A. No.

Q. But the Government did have your furniture?

[fol. 194] A. That is correct.

Q. And Mr. Ewald, of the Kansas City Title Company, is the man that made up the money?

A. And one other man.

Q. They are the ones that supplied the money; but the stamps on the deed?

A. Yes; it shows right here (indicating document).

Q. That is a statement?

A. That is correct.

Q. As to what happened? A. Yes.

Q. You knew when you received that, that was what you were getting?

A. Yes.

Q. And you knew, or by the exercise of a little care could have read that contract and known just what you were going to get, when that statement was made to you, too?

A. I questioned—

Q. If you had read and studied—

Mr. Blanton: Let him finish his answer.

The Witness: I questioned, when the six and a half per cent. was figured on the $38,500—the question I raised at that time, would the Government figure it that way, or would the Government take six and a half off the $41,000, which would change the net figure.

Mr. O'Bryan:

Q. You just didn't read your contract?

A. I read the contract.

[fol. 195] Q. You didn't properly interpret it?

A. Yes, I did, but I understood—

Q. That contract—

Mr. Blanton: Let him answer the question.

A. Here is what I felt: If we figured six and a half per cent. on $38,500 and the Government figured six and a half on $41,044.86, I would not receive my net figure, which proved to be a fact.

Q. Did you ever borrow any money from a loan company, one of these so-called—

Mr. Blanton: That is objected to, whether he did or not.

Mr. O'Bryan: He don't know how to figure. He don't know—

The Witness: I knew there would be a difference between figuring six and a half on $38,500 and $41,000.

Q. And that was figured at $41,000?
A. That is correct, and that is what I questioned.
Q. That is what this man figured?
A. That is right.

Redirect Examination.

By Mr. Blanton:

Q. I show you a rotogravure section from the Globe Democrat of Sunday, February 2, 1941, and call your attention to a picture of a house, at the top of page 11 of [fol. 196] that section, and I will ask you if that is a picture of your house.

A. That is correct. It shows the water plant, the underground—it doesn't show the park, or a cottage with three rooms and a bath. That is the house.

Q. It shows a correct picture of the hill there, adjacent to your home?

A. That is right.

Mr. Blanton: I will ask that that be marked as Government's Exhibit 4-E.

Mr. Watson: Are you offering that?

Mr. Blanton: I am going to, sooner or later. If it will help you, I will do it right now, Mr. Watson.

I now desire to offer—

Mr. Watson: I object to the admission of that in evidence, on the ground that it is entirely immaterial in this proceeding.

The Court: Overruled.

Mr. Blanton: That is all, Mr. Kaut.

Judge Collet: Wait just a minute. That could hardly be received as having to do with the course of dealing.

Mr. Blanton: No. I don't think it makes any difference one way or the other.

Judge Collet: I rather suspect that the objection should be sustained.

Mr. Blanton: If he insists on it being sustained, I ex-[fol. 197]pect it should be.

Judge Collet: All right.

Mr. O'Bryan: Withdraw the objection.

Mr. Blanton: Thank you for that, Redick.

Judge Collet: Is there any further cross examination, gentlemen?

Mr. O'Bryan: No.

Thomas H. Rogers, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct-Examination.

By Mr. Blanton:

Q. State your name to the Court, please, sir.

A. Thomas H. Rogers.

Q. Where do you live, please, sir?

A. 4 Sunset Lane, Kirkwood.

Q. How are you employed?

A. I am the director of the Bureau of the St. Louis Chamber of Commerce.

Q. Mr. Rogers, I will ask you if you owned any property out in the Weldon Springs area, which has been developed by the Government as a TNT and DNT plant.

A. I did.

Q. Where was your property located in that area?

[fol. 198] A. It was located on the west side of Highway 94, exactly five miles off from the Daniel Boone Highway, or Highway No. 61.

Q. I believe I asked you to bring along some papers, in obedience to a subpoena duces tecum: May I see them, please, sir?

A. Yes (handing paper to counsel).

Q. How much acreage was there in your place, Mr. Rogers?

A. Normally, seventeen acres.

Q. Was it improved?

A. After I bought the property I had improved—there was a stretch there that had been cleared. After I bought it I had it cleared out and excess timber below removed. I had the bushes and underbrush cleared out throughout.

Q. You cleaned it up, in other words? A. Yes.

Q. You bought this property for your home, did you?

A. I bought it wholly for residence purposes.

Q. It was not used for agriculture?

A. Only for beautification.

Q. With whom did you deal when you went to sign an option for your property out there, Mr. Rogers?

A. Several of the agents had called at my place. I was not there in the daytime. So, on November 11th, I believe it was, I went to St. Charles. I had been told by the keeper of the place that they had been in to see me several times, so I called at the office at St. Charles and dealt with Mr. [fol. 199] Bolton. Mr. McDowell was not there.

Q. How many rooms were in your house that you erected on this seventeen-acre place?

A. Five rooms, two baths, and a very large basement, and large porches.

Q. What value did you place on your property there, Mr. Rogers?

A. It was done by agreement with Mr. Bolton. My recollection is that it was, nominally, was about $22,300. That is not the exact figure.

Q. In other words, that is the value you placed on your property?

A. Yes.

Q. What was said and done about this six and one-half per cent. commission, or five per cent. commission to go to McDowell and one and a half per cent. to go to the title company?

Mr. O'Bryan: We object to that for all the reasons we have heretofore assigned.

Judge Collet: Overruled.

A. Do you want the substance of the full conversation and what led up to it?

Mr. Blanton:

Q. Yes.

A. I attended a meeting of property owners in that area, at the Howell High School. I gathered the impres-

sion from that meeting that the five per cent., and also the [fol. 200] one and a half per cent., was to be added to the purchase price. That was the thought that I gathered as a result of that meeting. In my conversation—

Q. Was Mr. McDowell at that meeting?

A. Mr. McDowell was at that meeting and spoke.

Q. Go ahead.

A. Then, in my conversation with Mr. Bolton I asked thoroughly as to what the agreement would be, not as to how it would be shown, but as to what the payment was to be, when we agreed upon the price. I was given to understand that the commissions paid was to be in addition to the price paid—agreed upon, and that was added to the price agreed upon and placed in the contract. My understanding was that my purchase, or, rather, the purchase of my property, was to be at a determined amount, which I put upon a slip of paper and put it in my pocket.

Q. And to that was added the six and one-half per cent., when the amount was inserted in the option?

A. Well, I was called over the long distance telephone by Mr. McDowell, who told me that my approved—no; that was another matter. I was told that the check had been received from Washington and asked me to come in to St. Charles.

Q. I don't believe you understood my question. The question was, at the time you signed the option, the amount included in the option contained not only the valuation that [fol. 201] you put on the property, but also included the six and a half per cent.?

A. Upon the agreed upon price.

Q. And added to the agreed upon price?

A. Yes.

Q. Now proceed about the settlement.

A. I went to Mr. McDowell's office at St. Charles. He took me over to the office, as I recall, of the Kansas City Title Insurance Company. The check had been received and was in possession of Mr. Bolton. I asked him what I owed. He gave me the figure, figured on a piece of paper. I said, "That is less than the price agreed upon." He had stated my purchase price. I looked at the slip of paper that I had and I analyzed it a moment, and I suggested that he was trying to charge a commission of six and a

half per cent. upon his commission, and protested that payment of a commission upon a commission. As a result—

Q. Right at that time, though, what was done about giving you a check; at the time of this Government check, which McDowell told you had been received, was there a disbursement of that check?

A. After the meeting I signed that check and was given a check upon the St. Charles Bank. The other check was, I presume, retained by the bank, because they had uttered the check to me.

[fol. 202] Q. At the time you made this settlement, Mr. Rogers, did Mr. Ewald here make the disbursement?

A. No, the disbursement, as I understood—Mr. Ewald was present, but the arrangement and the conversation largely was with Mr. Bolton.

Q. He was Mr. McDowell's representative?

A. I understood so.

Q. He was the one who signed the option with you, was he not?

A. That is correct.

Q. Mr. Rogers, at the time he gave you your check—at least, the time you received your check as part of the proceeds out of the check from Washington, did it represent the agreed upon amount, or was the check they gave you on that occasion for a sum less than the agreed upon amount?

A. The check from Washington included the agreed upon purchase price, plus the six and a half per cent. commission for the two agencies. They were deducting—they attempted to deduct six and a half per cent., five and one and a half, from the total of that. That made my purchase price something like seventy-five dollars, seventy-three or seventy-four dollars, less than the agreed upon price.

Q. Because it included six and a half per cent. on six and a half per cent.?

A. Correct.

Q. Did you accept that check?

A. I refused to accept it.

[fol. 203] Q. Did they then refigure it?

A. Mr. Bolton asked me what I wanted done. I said, "All I want is to be paid the agreed upon amount", and refused to accept less.

He says, "How can we reach a conclusion?" I suggested that it was his problem. They figured on it and couldn't reach a conclusion, and I suggested that they find a common denominator, which was done, and the amount agreed upon was relatively the amount that had been agreed upon at the meeting with Mr. Bolton on November 11th.

Q. So, you did then ~~get approximately~~ the agreed price after this argument there?

A. Yes.

Q. And the amount that was retained by the title company and by McDowell was not six and a half per cent. of the option price, but only six and a half per cent. of the agreed price?

A. That is correct.

Mr. O'Bryan: I move that all that testimony of Mr. Rogers be stricken out, for the reasons assigned when I moved to strike out the other witness' testimony.

Judge Collet: It will be received for the limited purpose indicated with reference to the Kaut settlement.

By Mr. Blanton:

Q. I will hand you Government's Exhibit 5, and will ask you if that is your copy of the option that was signed between yourself and your wife and Mr. Bolton.

[fol. 204] A. It is.

Q. Which included the agreed price, plus the six and a half per cent.?

A. Correct.

Q. I now hand you Government's Exhibit 5-A, which seems to be a letter on the letterhead of R. Newton McDowell, and the second page signed by McDowell, and ask you if that is the letter that you received when you had your option returned to you, bearing the approval of Colonel Valliant.

A. It is.

Q. And Government's Exhibit 5-B, is that the settlement sheet?

A. Government's Exhibit 5-B is the settlement sheet which was not adhered to.

Q. This is the sheet that they tried to get you to accept? When I say "this" I mean Government's Exhibit 5-B, but it was departed from in that they added to the

amount purporting to be paid to you on this sheet a sufficient amount to pay what was originally considered the agreed price?

A. That is correct, and that was paid to me by a check from Mr. McDowell for his share of the over-charge, and a check from the Kansas City Title Company for its share of the over-charge.

Q. So, you got a check, as a part of the proceeds from the Government, for $22,526.10, and in addition thereto got a check from McDowell for his part of the over-charge [fol. 205] and a check from the Title Company for its part of the over-charge?

A. No. I think that was reduced, as a result of that. That does not represent—I have no figures on the amount to which I was entitled, but that is somewhat less, as I recall, than the figures shown there. Possibly—I don't remember the amount—it may have been $22,350 or 250—it was somewhere in that neighborhood.

Mr. Blanton: I would like to offer these exhibits as a portion of Mr. Rogers' testimony, Exhibits 5, 5-A and 5-B.

Mr. Watson: I object to the offer of all those exhibits, for the same reasons heretofore stated, and for the further reason that there is no evidence in this record with reference to the Callaway deal, to the effect that such a transaction as is considered here was entered into there. Therefore, this evidence here is immaterial and inadmissible.

Judge Collet: It will be received for the limited purpose indicated at the time Mr. Kaut's statement was admitted.

Government's Exhibits 5, 5-A and 5-B are in words and figures as follows, to-wit:

[fol. 206] U. S. exhibit 5 is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 5-A is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 5-B is on file in the office of the Clerk of the Court of Appeals.

[fol. 207] Cross-Examination.

By Mr. O'Bryan:

Q. Mr. Rogers, how long did you own that tract of land out there in St. Charles County?

A. My recollection is I purchased it early in 1934.

Q. Did you build a home on it after you purchased it?

A. I improved it; not only built a home, but improved it in every way.

Q. Built it for a country home?

A. Not a country home; a home.

Q. With whom were you employed at that time?

A. The St. Louis Chamber of Commerce.

Q. How long have you been with the St. Louis Chamber of Commerce? A. About twenty years.

Q. You are their legislative representative in the Missouri Legislature?

A. Legislation and taxation.

Q. You have had a great deal of experience and dealings for the purchase of property and convincing people of things to be done, and practicing psychology, have you not?

A. I have had very little to do with the purchasing of property.

Q. You sold this piece, did you not? I say, you sold this piece to the Government?

A. No. I regard that as a seizure. The place was not for sale.

[fol. 208] Q. You set a price of $24,122.51?

A. I did not.

Q. For the seizure? You didn't set that price?

A. I did not.

Q. Mr. Rogers, you are capable of reading and figuring. I heard you use the term "common denominator" a while ago. You are pretty good at arithmetic, are you not?

A. Well, I do elementary arithmetic.

Q. And you have just told Mr. Blanton that you signed Government's Exhibit 5, along with your wife, did you not?

A. I signed it, yes.

Q. I will ask you if this is a copy of what you signed, and it was filled out in that manner.

A. It is evident. That is my signature.

Q. And that sum was set out there, wasn't it?

A. The sum was set out. I explained in my direct examination that that was put in there with the understanding that the agreed upon price was to be paid and the amount of the commission in excess of that, and the evidence of that is that the two other parties returned to me by check the amount to which I was entitled.

Q. You read that over before you signed it, did you not? A. I had read it over.

Q. And $24,122.50 was inserted in that, wasn't it—even [fol. 209] 51 cent' –$24,122.51 was inserted there before you signed it?

A. It was inserted in there.

Q. And then it said, "Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent. (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction"; was that in there when you signed it?

A. Before any signing of that I had a specific statement, and as a condition to signing it, that the amount of my purchase price was the amount that I indicated in the direct testimony.

Q. But you didn't insert that into the written agreement— A. No.

Q. —that you offered to the Government? A. No.

Q. Colonel Valliant didn't have any of that before him; any of your ideas as to what should have been in there, or any of your talk with anyone was not inserted in there and sent to Colonel Valliant for his approval?

A. I have no idea what supplemental statement was sent to Colonel Valliant.

Q. This was all over your signature, that was sent?

A. Yes.

Q. And this was what came back with his approval on it, [fol. 210] wasn't it? A. So far as I know.

Q. There it is. You got it back. You gave it to Mr. Blanton to introduce in evidence.

A. That is all that I received.

Q. You received this. Then the check came to St. Charles to the title company and you went over there and you went to figuring, and you had set a price in your own mind that you wanted net for that property?

A. It was an agreed upon price that had been set mutually between Mr. Bolton and myself.

Q. You had in your own mind a certain sum of money that you wanted, did you not? A. Yes.

Q. Then you sat down and you took six and a half per cent. of that and added to that agreed price that you wanted, six and a half per cent., did you not?

A. That was placed in the contract. I was told it was the procedure. I did not produce—

Q. Did you not sit down and figure it yourself with a pencil and paper, what you were going to get; did you not sit down and take the sum that you aimed to get for this property and multiply it by six and a half and add that to the sum?

A. All I expected at any time was to get the $22,000—relatively $200 or $350—

Q. Did you not take $22,350 and multiply it, right there [fol. 211] with Mr. Bolton, by six and a half, and add it to this? A. I did not.

Q. But when you made this price to the Government of $24,122.51 and you were handed that break-down by Mr. Ewald, you figured that you had not figured six and a half per cent. on $24,122.50, but you had figured it on the lesser amount; is that right?

A. I had figured it upon the agreed upon amount.

Q. You have got a good enough education and are well enough versed in arithmetic so that you know if you take $100 and take ten per cent. of it and add it to it, it makes $110, don't you, and if you take it on the $110, that is $11.00, isn't it? A. I assume that it is.

Q. That is exactly what you found out when you went to the title company that day, that you had not figured the commission on the right amount, you had figured it on the less amount, and when Mr. Ewald did the figuring he had to take the commission off of the gross?

A. The commission was taken off from the excess—rather, taken off from the five per cent. commission and the one and a half per cent. commission.

Q. It was taken off of the gross amount of $24,122.51?
A. In the payment of the money, yes.
Q. And then you went to McDowell and to Ewald and [fol. 212] said, "I am paying you commission on commission. You have to pay me back, each of you, so much money"? A. No, I did not.
Q. You didn't tell them that—

Mr. Blanton: Let him answer.

The Witness: I would not accept the amount—would not accept an amount less than the amount agreed upon on November 11th.

By Mr. O'Bryan:
Q. Less than the amount that you had in your mind you were going to get?
A. Not that I had in my mind, but that we had agreed upon.
Q. But you figured that six and a half and added it to that $22,000, did you not?
A. It was not done by myself, although I signed.
Q. You just didn't admit, when you went to settle that day, that you figured it on the wrong basis? A. No.
Q. You didn't figure it on the wrong basis, but it was figured on the wrong basis?

Mr. Blanton: That is arguing with the witness.

Judge Collet: Overruled.

By Mr. O'Bryan:
Q. It was figured on a wrong basis, was it not?
A. Whoever tried to collect that money—Mr. Bolton was attempting it upon a basis that was not the correct one.
Q. But the correct one according to that offer to purchase that you signed, though, was it not?
[fol. 213] A. I do not think so.
Q. Don't you recall what that says?

Mr. Blanton: We want to renew our objection to this further cross-examination.

Mr. O'Bryan: The Court can understand this, I think. I am through. All right, Mr. Rogers.

RUDOLPH H. SINOCK, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name and address to the Court, please.

A. Rudolph H. Sinock; Wentzville, Missouri.

Q. How long have you been a resident of St. Charles County, Mr. Sinock?

A. I have lived there since 1936, sometime in 1936.

Q. Did you own some property in the area which the Government took over for the purpose of constructing the TNT plant? A. Yes, sir.

Q. Where was your property located within the area, please?

A. It was fairly close to the north border, about three miles north of Howell, on the Howell Ferry Road.

Q. How much acreage did you own in the area?

A. One hundred and one, more or less.

Q. Was it improved? A. Yes.

[fol. 214] Q. Did you enter into an option agreement, Mr. Sinock, with the McDowell organization?

A. Yes, sir.

Q. I wish you would state with whom you handled your transaction.

A. I handled that transaction with a gentleman by the name of King, who was a representative of McDowell.

Q. You may state what the agreement was that you had with Mr. King about the valuation you placed on your farm, and the handling of these commissions.

Mr. Watson: I object to any agreement he had with King, and I object to all this with reference to the Sinock deal, if the Court please, on the same grounds as heretofore stated.

Mr. Blanton: So far as we are concerned, it is agreeable to us that that objection run throughout this line of testimony, and we can save that much time, if we can consider Your Honor's ruling the same, and the exception saved.

Mr. Watson: It will not take long to make the objection.

Judge Collet: Objection overruled.

A. My agreement was, that is, the agreed price set was $18,000 for my farm, and to that we added the six and a half per cent., which made a total of $19,174.

Mr. Blanton: What was your understanding with Mr. King, of Mr. McDowell's organization, as to the amount [fol. 215] you were to receive when the check was delivered and disbursed?

A. Well, I assumed at that time when I signed the option that I was to receive $18,000.

Mr. O'Bryan: I move to strike out the answer for the reason that it is an assumption and not a fact.

Judge Collet: The motion to strike is sustained.

By Mr. Blanton:

Q. You may state what was said about the value you placed on your farm, Mr. Sinock, at the time you made the deal with Mr. King; not what you assumed, but what was said between you and Mr. King.

A. I said that I wanted $18,000 for my farm and I expected to be paid—that is, to receive from the Government the amount of money to pay this five per cent. and one and one-half per cent., and we added six and a half per cent. to the $18,000 which made $19,174.

Q. Did you bring some papers with you, Mr. Sinock, which I asked you to bring along—a settlement sheet?

A. No, sir; I did not.

Q. When your settlement was received, did you receive $18,000? A. No, sir, I did not.

Q. What did you receive?

A. Well, with the taxes and revenue stamps and recording fees deducted, and the commission deducted, I received $17,866 and a few cents. I believe that is correct.

Q. With whom did you make your settlement?

[fol. 216] A. With a gentleman by the name of Lamkins, I believe, in the Kansas City Title Company office.

Q. When the settlement was made with you was the six and a half per cent. figured on the $18,000 or on the amount of your option?

A. It was figured on the amount of the option.

Q. So that, you paid commission on commission, then?

Mr. O'Bryan: We object to the District Attorney arguing with the witness.

Judge Collet: Overruled.

Mr. Watson: We object on the ground that that question calls for a conclusion of the witness.

Judge Collet: What discussion did you have about that with Mr. Lamkins?

The Witness: Well, I had a little discussion with him. I told him that I expected to receive the agreed upon price for the farm, which was $18,000, and he informed me that there had not been any settlement that way, that the option read the commission was supposed to be deducted out of the total price to the Government, which was done.

By Mr. Blanton:

Q. What was the difference to you in amount, between what you would have received if you had received $18,000, and what you did receive?

A. I never figured exactly, but that amounted to somewhere near seventy dollars, I believe.

[fol. 217] Q. I will ask you if you attended this mass meeting at Howell about which there has been some testimony. A. Yes, I did.

Mr. Watson: I make the same objection as heretofore.

Judge Collet: Overruled.

By Mr. Blanton:

Q. I will ask you if you heard Mr. McDowell make any statement at that mass meeting as to how this five per cent. commission he was to receive, and the one and a half per cent. the Kansas City Title Company was to receive, was to be handled in these purchases.

A. I have been trying to refresh my memory about hearing something like that, but I don't recall him ever making that statement. It may have been made, but I was acting as Chairman of the meeting, and there were so many things happening that it probably went over my head, but I do recall a question being asked about the settlement—

Q. When you signed your option it was made on that basis? A. Yes, but I had signed my option.

Q. When you did execute your [opinion] that was added to the value you placed on your farm, this six and a half per cent.? A. Yes.

Q. I will ask you if you were one of a citizens committee which was selected to represent the landowners in that area. A. I was.

Q. Was that selection made before or after you had [fol. 218] signed your option?

A. I just don't recall that, whether that was before or after, but it seems to me that it possibly was after I had signed the option, because I signed the option amongst the first that were signed.

Q. I hand you a Government's exhibit which has been identified as G-11. I wish you would look at that, if you will, please.

Mr. Blanton: (To Mr. Watson) That is the one that was identified by Langenbacher.

A. Yes, I remember that letter.

Q. I wish you would look at the last page of it. I believe it bears your signature, doesn't it, Mr. Sinock?

A. Yes.

Q. You helped formulate and prepare that document, did you?

A. Well, I don't remember helping formulate it or prepare it, but I was asked to sign it, to go out under the signature of the committee.

Q. You approved of it? A. Yes.

Q. The statement contained in this letter, dealing with the information given by Mr. McDowell and the questions asked him and answered by him, are true and correct as quoted in this letter, are they?

A. I don't remember what those statements are.

Q. I refer you specifically to the second paragraph of this document which, as the paragraphs are numbered, read 2, 3, 4, and so forth, on page 2.

[fol. 219] A. (After examining document) I remember. I recall that now.

Q. During the preparation of that letter did you and the other members of the committee confer with Mr. McDowell?

A. I believe there was a meeting that afternoon and I think that letter was prepared the following day at Mr. Langenbacher's office.

Q. After you had conferred with McDowell?

A. That is right.

Q. This piece of property that you bought, I believe you say it contained—how many acres?

A. One hundred and one acres.

Q. Did you put any improvements on it after you purchased it? A. Yes.

Q. What was the nature of your improvements?

A. I built a house and a barn and a corn crib, new hen house, brooder house, a garage, and fenced practically the entire place, and along with that other improvement naturally cleaning it up, and so forth.

Mr. Blanton: You may take the witness, unless Your Honor wants to adjourn at this time.

Judge Collet: Yes, we will suspend this hearing until two o'clock.

Judge Davis: May I have the date of the Rogers op-
[fol. 220] tion and the Kaut option?

Mr. Blanton: Yes, Your Honor. The Kaut option was signed November 19 and the Rogers option on the 11th of November, and Mr. Sinock states that his was signed before the Howell school meeting.

The Witness: I think mine was signed on the 30th.

Mr. Blanton: Of October?

The Witness: 30th of October.

Judge Davis: And the Kaut was on the 19th?

Mr. Blanton: Yes, the Kaut was the 19th and the Rogers the 11th of November.

At this point, a recess was had until two o'clock P. M.

[fol. 221] After recess, on March 31, 1942, at two o'clock P. M., the following proceedings were had:

Cross-Examination.

By Mr. Watson:

Q. Mr. Sinock, what was the amount of your option contract?

A. The option contract was $19,174.00.

Q. Have you ever sold a piece of real estate before, on which you paid a commission? A. Yes.

Q. How did you sell that real estate; did you take into consideration the fact that you had to pay a commission, in fixing your price? A. Yes, sir.

Q. Isn't that what you did in this case? A. Yes.

Mr. Drake Watson: That is a conclusion of the witness. The facts speak for themselves.

Judge Collet: Overruled.

Mr. O'Bryan: It is their yardstick.

Judge Collet: Go ahead.

Mr. S. M. Watson: Q. As a matter of fact, you wanted $18,000 for your property, net? A. Yes.

Q. And you realized that in order to get $18,000 net you would have to ask a sufficiently higher price so that the sum total would leave you $18,000 net?

A. Yes, I realized I had to add six and a half per cent. to that.

Judge Collet: (to the witness): Speak louder.

[fol. 222] The Witness: I said I realized I had to add the six and a half per cent. to that.

By Mr. Watson:

Q. You read that contract, did you not, Mr. Sinock?

A. Yes.

Q. And what price was stated in the contract?

A. $19,174.00.

Q. Did you see in that contract a provision to the effect that a commission of five per cent. was payable on the gross sales price? A. Yes.

Q. And was it represented to you that you would be expected to pay a fee of one and a half per cent. on the gross sales price? A. Yes.

Q. You realized that that was what would be done?

A. Yes.

Q. Now, I believe reference was made to a certain letter, in your direct examination, sent out by a committee of which you were a part? A. Yes.

Q. You were a member. When did you first meet with that committee, and where?

A. I don't remember just the exact date of our first meeting; we had quite a few, and I just don't recall, but it was shortly after we were notified that the Government was going to purchase that area.

Q. What was the purpose of the formation of that committee, and who formed it?

[fol. 223] A. I think that Mr. Langenbacher's office was instrumental in forming that committee; at least, I was approached by Mr. Langenbacher to be a member of that committee.

Q. Did he acquaint you with the purpose of the committee?

A. Yes, to a certain degree. I understood that the committee was supposed to act as a group to receive and transfer any information pertaining to the acquisition of that land, and how it was to be handled, and so forth. At the time the committee was formed there was so many rumors and misunderstandings throughout the community, that they tried to straighten out.

Q. Was it the purpose of the committee to represent the landowners, the farmers, or to represent the Government, or what was the purpose of the committee?

A. I don't feel as though I was, or the committee, or myself, was selected to represent anyone in particular. We were just kind of go-between.

Q. You were to perform a service, were you?

A. Yes, for the landowners, to a certain degree.

Q. And also for the Government, weren't you?

A. I expect to a certain degree, yes.

Q. At which meeting was this letter that was talked about this morning first considered?

A. To the best of my recollection, that letter was for-

[fol. 224] mulated after the meeting we had at the Francis Howell High School one afternoon. The committee met with Mr. McDowell and Mr. Langenbacher and Mr. Moliter and Mr. Woods, of the Farm Security Division,

and quite a few people were present, and at that meeting we discussed the majority of topics in that letter, and I am inclined to believe that letter was formed afterwards by Colonel Ringland, of the National Defense Commission.

Q. You mean, Colonel Ringland was a member of the National Defense Commission? A. Yes.

Q. Do you know in what capacity he sat on the National Defense Commission? A. That I don't know.

Q. I believe you said you thought the letter was prepared by Colonel Ringland?

A. I believe that it was prepared by Colonel Ringland, because it was brought out to us either that same night or the following night—we had another meeting at Mr. Miller's residence, and we were asked to sign that. He wanted that letter to go out over our signature, and we read the letter and signed it.

Q. Colonel Ringland asked you to sign it?

A. I am quite sure that he was the one that brought the letter there.

Q. He brought the letter there to you. Was there any other representative of the Government, other than Col- [fol. 225] onel Ringland there at that time?

Mr. Blanton: I object to the assumption that Colonel Ringland was representing the Government in this transaction.

Mr. Watson: He testified that Colonel Ringland of the National Defense —

Mr. Blanton: The testimony is that Colonel Ringland didn't have any authority to go out there and purchase this land.

Judge Collet: You may ask him—

Mr. Watson: Was there anyone else in the employ of the United States Government present at that time?

A. At the time we signed this letter, or at the meeting where this was discussed?

Q. At either time.

A. I would say that Mr. Langenbacher was an employee of the Government and was there. That is the only one I know—and there was Mr. Woods and Mr. Moliter, of

the Farm Security Division. They are all employed by the Government, I believe.

Q. You spoke of the Farm Security Commission: I believe you said Mr. Woods was of the Farm Security Commission?

A. I believe that he was.

Q. What was the Farm Security Commission doing with reference to this matter, if anything?

Mr. Blanton: I object to what the Farm Security Administration had been doing, or not doing.

[fol. 226] Mr. Watson: I think this is pertinent. You have gone into this on direct examination.

Judge Collet: What is the purpose of that?

Mr. Watson: The purpose of it is, Your Honor, to show that this letter was a letter gotten out by Government agencies, participated in by Government agencies, that the Government is responsible for the representations made in this letter that it induced these members of this committee to send out.

Judge Collett: Objection sustained, if that is the purpose.

Mr. Watson: I think that is all.

Mr. Blanton: That is all, Mr. Sinock.

Mr. O'Bryan: If the Court please, did I understand that you sustained that objection?

Judge Collet: Yes. There has not been any intimation that the Farm Security Administration had anything to do with that transaction, or had any authority whatever, either remote or speculative, to bind the Government in these transactions.

Mr. O'Bryan: If the Court please, you have been admitting evidence subject to objections. The United States Government is not composed of the War Department; it is not composed of the Ordnance Department, as a department, nor of the Quartermaster Department. The United States Government is composed of all the organizations that it sets up, and, subject to that objection, there is going [fol. 227] to be evidence introduced here showing that

various units of the United States Government went out there and participated at the time of the acquiring of this land by deed, to rehabilitate those people and put them in other localities, and there were three or four different units trying to work in conjunction with one another out there, trying to acquire that land and rehabilitate the people, too, and I should think it is admissible to say that the United States Government is composed of all those units, together with you and I, and this judicial branch, along with the legislative branch.

Judge Collet: It may be that your statement will be of some help if you will tell me this: What effect will it have upon the validity of these contracts, whether the Farm Security Administration did these things or not? It may be it has some bearing.

Mr. O'Bryan: The Farm Security Administration was sent out here by those in charge of it to go out and assist in rehabilitating those people and re-lodging them in other localities.

Judge Collet: My question is, what bearing would that have on the validity of these contracts?

Mr. O'Bryan: If they were obtained through fraud—not undue influence, but fraud, and the cobweb is trying to be weaved here that it is a fact, and there was fraud—the [fol. 228] burden of proving fraud is upon the United States Government, which is the plaintiff in this case.

Mr. Blanton: Your Honor, in order that the record may be clear, I would like to state the ground of my objection.

My objection is that this line of testimony is an attempt to bind the Government by someone who has not been shown to possess any authority. The record here, which the owner herself has produced, shows that the Secretary of War was the person who was authorized to acquire this land, either by condemnation or by purchase, and any action which may be taken by the more than a million Government employees who are now on the Government payroll, certainly would not be binding on the United States.

Judge Collet: My associates desire that this evidence be in the record, and it will be admitted, subject to that objection, for that reason.

Mr. Blanton: Note my exception, please.

Judge Collet (to the witness): You may answer.

The Witness: It seems they was there—

Mr. Blanton: We object to his assuming what they were there for.

Judge Collet: You have to state who was there.

I assume he will have to show that they were the Farm Security Administration and then it will probably be proper [fol. 229] for them to show what these people said. Now, go ahead.

The Witness: They were there—

The Court: Just a minute. Who was there?

The Witness: Mr. Woods and a staff of employees of the Farm Security Administration.

Mr. Watson: Did they represent themselves to be employees—

Mr. Blanton: I object to what they may have represented themselves to be. That is not the best way to show who they were. If he has those witnesses here, as Mr. O'Bryan indicated—

Mr. O'Bryan: I didn't indicate I had those witnesses here.

Judge Collet: I think we will hear what they said.

(To the witness) When they represented themselves to be something, what did they say?

The Witness: Well, they were here to canvass the entire—

Judge Collet: What did they say?

The Witness: At this particular meeting?

Judge Collet: Yes.

The Witness: They entered into all the discussion that pertained to that letter, to a certain degree, in regard to these disturbance charges, these payments for wheat crops,

[fol. 230] and moving expense, and all those things. They were in that discussion with the rest of us, with this committee.

By Mr. Watson:

Q. You speak of "they": Mr. Woods was one, was he?

A. Yes, sir.

Q. And who else?

A. I don't recall all the names of the men that he had with him, but Mr. Woods was the leader of that particular group. He was in charge of that particular group that was there.

Q. And they discussed these matters that you referred to with your committee? A. Yes, sir.

Q. Did they discuss those matters with Mr. Ringland; did he participate in that discussion with them?

A. Yes; he was in the room at the same time, yes.

Q. Then did Mr. Ringland write up that letter after that conference and bring it to you—

A. I didn't see Mr. Ringland write the letter, but I assume that he did.

Mr. Blanton: We ask that all this testimony about Mr. Ringland having written the letter be stricken. Mr. Langenbacher said he didn't prepare it, it was prepared in his office. We ask that the testimony of this witness now stating he assumes Mr. Ringland wrote that letter, be stricken.

Judge Collet: That answer will be stricken.

By Mr. Watson:

Q. Did Mr. Ringland bring that letter to the committee?

[fol. 231] A. I believe that it was Mr. Ringland. I don't just remember. It has been several years ago, or a year and a half ago, but we had a meeting and that letter was brought to us to be signed. We were asked to sign that letter and it was shortly after this meeting we had at the high school, where all this matter in there was discussed at that particular meeting.

Q. And Mr. Ringland was present at the time you were asked to sign this letter; is that true?

A. That I wouldn't verify, because Mr. Ringland was in a hurry to get back to Washington, whether he was there

then or not, whether he brought the letter, or whether he was even present.

Q. At this meeting of which you speak, in which these matters were discussed, what matters were discussed; was there anything discussed about crops?

Judge Collet: About what?

Mr. Watson: About crops, about what allowance would be made for crops.

A. Yes, sir.

Q. Was there any issue about that matter?

A. Yes, there was some issue.

Q. Describe that issue.

A. Well, Mr. McDowell had set a price of a certain amount to allow for wheat acreage—I don't remember what the figure was, but it was lower than a farmer could actually [fol. 232] have sowed an acre of wheat. We discussed that quite at length at that meeting and it was finally agreed that Mr. McDowell would allow $7.50 an acre for wheat, in any future option that he would sign. Colonel Ringland was very instrumental in getting that figure up, because he said that—

Mr. Blanton: We have not had any showing who Colonel Ringland is.

Mr. Watson: He said he was a member of the National Defense Commission.

Mr. Blanton: That didn't give him any authority to negotiate these contracts or bind the Government.

Judge Collet: That part of the witness' answer that Colonel Ringland was instrumental, may be stricken as the witness' conclusion.

(To Mr. Watson): Proceed with your examination.

By Mr. Watson:

Q. I believe you stated that Mr. McDowell was contending for a price per acre for wheat which was actually less than the cost of planting or sowing the wheat, is that it?

A. That is correct, yes.

Q. About that price per acre: That was the price for the growing crop, that was to be paid?

A. Growing crop, that was growing, yes.

Mr. Watson: I think that is all.

Redirect Examination.

By Mr. Blanton:

Q. That crop had been sowed only about three or four [fol. 233] weeks, had it not, Mr. Sinock?

A. Yes.

Mr. Blanton: That is all.

Mr. O'Bryan: If Your Honor please, we ask that Mr. Sinock shall not leave. We may want to recall him in our rebuttal testimony, and we think we will want him here.

Louis E. Wackher, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name, please, sir.

A. Louis E. Wackher.

Q. Where do you live, please, sir?

A. Weldon Springs, Missouri.

Q. Did you own some property out in the Weldon Springs area, Mr. Wackher? A. I did.

Q. Where was your property located?

A. Located at Hamburg.

Q. Of what did it consist?

A. It consisted of two lots and a dwelling and outbuildings.

Q. How far from highway—

Judge Moore (to the witness): Speak louder.

Mr. Blanton: He said two lots and a dwelling, Your Honor.

[fol. 234] Q. How far from new Highway 61 is Hamburg?

A. About four miles.

Q. Approximately what was the population of Hamburg? A. Just about two hundred.

Q. With whom did you negotiate your trade on this property, Mr. Wackher? A. A fellow by the name of King.

Q. In Mr. McDowell's office?

A. No; he was at the house.

Q. He came to your home, did he? A. Yes.

Q. Did you bring some papers with you?

A. I brought some of them along (handing papers to counsel).

Q. Mr. Wackher, when you entered into your arrangement with Mr. King, I will ask you if you placed a value on your property.

A. I did.

Q. What sum did you value your property at?

A. $6,500.

Q. What understanding did you have with Mr. King about the payment of this six and a half per cent. commission? A. Well, I told him—

Mr. Watson: That is objected to as entirely irrelevant and immaterial, for the same reasons heretofore urged.

Judge Collet: Same ruling.

A. I told him that I wanted $6,500 net, and if there was [fol. 235] any expenses that would be added on there.

Q. Was the $6,500 the value you put on your property?

A. That is it.

Q. That was the full value, was it? A. Yes.

Q. When the option was written up was it written up for the $6,500, or for a sum in excess of that?

A. In excess of the $6,500.

Q. And it included what items in addition to the $6,500?

A. There was McDowell's commission and the Kansas City Title Company's fees and stamps, and whatever other expenses there were.

Q. In other words, not only did you add the McDowell commission and title company's fee to what you considered the full value, but you even included the stamps?

A. I think they were added, yes.

Q. Did you also add the Recorder's fee?

A. No, I didn't. Mr. King figured that up, all the expenses.

Q. Is this your option, Mr. Wackher—

I will ask to have these marked Government's Exhibits 6 and 6-A.

(The documents indicated by counsel were marked as requested.)

Q. I hand you Government's Exhibit 6, and will ask you [fol. 236] if that is the option that King entered into with you.

A. That is the one, yes.

Q. It seems to be dated, I believe, November 15th, 1940; is that correct? A. That is right.

Q. Was that the date it was signed?

A. Yes, I think it was.

Q. When your check came in, I will ask you where you made your settlement.

A. At the Kansas City Title Company office.

Q. I hand you Government's Exhibit 6-A and I will ask you if that is the settlement sheet.

A. Yes, that is it.

Q. Now, that shows that you received, instead of $6,500, that you received $6,468.56, does it not? A. Yes, sir.

Q. That is about $31.44 short of the $6,500, is it not?

A. Yes, sir.

Q. Did you have any discussion about the difference between the amount that you were to receive and the amount that you did receive?

A. Well, I—

Mr. Watson: I object to this line of evidence, and any further evidence of this nature at this time, for the reason that any evidence here introduced for the purpose of showing the state of mind, or the course of dealings of Mr. McDowell, is irrelevant, unless it be shown that the defendant, Callaway, also participated, the charge in the plaintiff's reply being that Mr. McDowell and the defendant [fol. 237] Callaway conspired against the Government, and also that Mr. McDowell and other landowners in the area conspired. Unless the testimony has a tendency to show that other landowners in the area, including Miss Callaway and Mr. Wackher and Mr. McDowell, conspired, it is not admissible.

Judge Collet: All the testimony is not directed to establishing conspiracy; for that reason the objection is overruled.

(Last previous question and answer read.)

A. We got notice to come down and make final settlement. After looking over the settlement sheet I noticed it never had me listed for as much as I was supposed to get, so I made mention—

By Mr. Blanton:

Q. To whom did you mention the fact that you didn't get the full $6,500?

A. It was the party that was figuring out the settlement sheet. I don't recall his name.

Q. Was it Lamkins, shown on the back of the settlement sheet? A. It was probably him; I guess it was.

Q. Somebody in the title company's office?

A. That is it.

Q. Did you ever get your $31.44? A. No, sir, I haven't.

Mr. Blanton: I think you may take the witness.

Mr. O'Bryan: We object to that testimony and move [fol. 238] it be stricken out, because it is apparent from the answer of the witness that it was not the United States Government, the plaintiff in this case, that was defrauded; if anybody was defrauded it was the witness himself, who was no party to this transaction.

Judge Collet: Overruled. Is there any cross-examination?

Mr. Blanton: As part of that, I want to make a formal offer, Mr. Watson, of Government's Exhibits 6 and 6-A.

Mr. Watson: Same objection urged.

Judge Collet: Same ruling.

Government's Exhibits 6 and 6-A are in words and figures as follows, to-wit:

U. S. Exhibit 6 is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 6-A is on file in the office of the Clerk of the Court of Appeals.

[fol. 239] Cross-Examination.

By Mr. Watson:

Q. Mr. Wackher, did you read that contract before you signed it? A. Well, I thought I did, yes.

Q. Did you notice a provision in there to the effect that you were to pay a five per cent. commission on the gross sales price?

A. I noticed that, yes, sir.

Q. Were you aware of the fact, when you signed that, that not only that net amount that you metioned, but the net amount with the other items added on to it, was embodied in that instrument as a consideration?

A. I just figured I had to pay the six and a half per cent., that is, on the amount that I was supposed to get.

Q. You figured that you were to pay six and a half per cent. on that price, that was mentioned in the option?

A. That is it, and that was added on.

Mr. Watson: That is all.

Redirect Examination.

By Mr. Blanton:

Q. You figured that your property was worth $6,500, did you, Mr. Wackher? A. That is it, yes.

Q. And these other items were added on to that and included in the total listed in the option, is that correct?

A. That is right.

Mr. Blanton: That is all.

Mr. Watson: That is all.

Mr. Blanton: Thank you, Mr. Wackher.

[fol. 240] Theodore Seib, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please.

A. Theodore Seib.

Q. Where do you live, Mr. Seib?

A. At present I am living at Chesterfield, Missouri.

Q. Have you heretofore owned land in the Weldon Springs area? A. Yes.

Q. Did you bring some papers with you, in obedience to a subpoena duces tecum?

A. Yes (producing papers).

Mr. Blanton: I will ask that these be marked Government's Exhibits 7, 7-A, 7-B and 7-C.

(The documents indicated by counsel were thereupon marked as requested.)

Q. Where was your property located in the area, Mr. Seib?

A. On the east side of No. 94, in Hamburg, Missouri.

Q. With whom did you handle your transaction when you entered into an arrangement to sell the property to the Government; was it Mr. King?

A. It was Mr. King, who represented Mr. McDowell.

Q. I show you Government's Exhibits 7 and 7-A and I [fol. 241] will ask you if those are the two copies which were executed by you and your wife at the time.

A. This here is the duplicate and—

Q. One bears the acceptance of Colonel Valliant and the other one is the one you kept right straight through?

Mr. Watson: May I interpose the same objection to this that I have heretofore interposed?

Judge Collet: Same ruling.

By Mr. Blanton:

Q. Those seem to be dated the 16th of November, 1940. Is that the date upon which the option was signed by you?

A. When it was signed, yes.

Q. Now, what is this Government's Exhibit 7-B, which I see you brought along with you?

A. Mr. King came to my home one day and he said there that he was taking options for the Government. They was going to take over this for the TNT plant which, of course, I seen already in the paper, and he wanted to know what I wanted for my property. I told him well, I didn't know, that I never had figured on selling it. He said, well, he would like to have an option on it. I said well, I would have to figure up and see what my property is worth, because I didn't do all the building at one time; never let it

out by any contract. I put up my home when I got the money. And so, then, we got together, my wife and I, we figured up what our house was worth, what two brick [fol. 242] bungalows we had on our lots was worth. We had two lots there. And we figured about $9,400. So, when Mr. King came around the next day we told him we would give him an itemized account; we wanted the Government to know what they was buying. He says, "Well, I get five per cent." I said, "See what that is on that contract." I said, "I ain't selling; you are buying." I would have to have more money, then, so I added $600 for expenses. So, that made an even $10,000. When settlement time came I got $9,336.50, I believe; $3.50 less than I was to get.

Q. You valued your property at $9,400?

A. Yes; that is what I wanted.

Q. And you got back $9,336.50, did you not?

A. $3.50 less.

Q. Well, that was $65.50 less than what you expected to get, wasn't it?

Mr. O'Bryan: If the Court please, he is arguing with the witness, testifying for him, and everything else.

The Witness: $9,400 is what I wanted—

Judge Moore: How much did he get?

Mr. Blanton: $9,336.50, Your Honor, and this valuation he placed on his property, as shown by Exhibit 7-B, showed a total of $9,400, to which he has added an item marked "Expense" of $600, making a total of $10,000, the amount in the option.

Q. Now, Mr. Seib, I will ask you if the two-story house [fol. 243] in—at least, is that the property that was located in Hamburg, that $8,000 property?

A. Yes; that is a two-story home, modern home, is what it was, seven rooms.

Q. You had two brick faced cottages on the same lot, which you figured at $1,200? A. $600 apiece, yes.

Q. And then $100 on the storage house and barn, so you put a total valuation of $9,300 on lot one, with all the property and you valued the vacant lot, which is lot 2, as $100, and that makes up the $9,400?

A. Yes, sir.

Q. What did you mean when you added expense in the sum of $600?

A. Well, I meant that is what I would have to pay for the expenses for the abstract and whatever may come—the expense that was entitled, or that would occur in winding up the deal.

Q. Six and a half per cent. on $9,400 would not quite figure that, would it?

A. I never figured it exactly; I just guessed at it and said make it $600, is what the expense would be. So, the expense amounted to a little over $600.

Q. You were just lumping it up? A. Yes.

Q. You didn't consider that $600 as any part of the value of your property, did you, Mr. Seib?

A. Well, no. That was the real value of our property, that is the figures I put it in at, but I was not going to pay any expense for getting rid of my property when I didn't want to sell it.

[fol. 244] Q. So, by the figure you turned in, although your option contract provided you were to pay the commission, you figured it so the Government would be paying the commission, did you, Mr. Seib? A. Yes.

Q. Did you give a copy of this statement which you have identified here as Government's Exhibit 7-B, to be attached to your option which you sent in to Washington?

A. I gave them a copy of that and I think he also took the figures. Whether he sent them in, I don't know.

Q. The copy you gave them, was it the typewritten portion, or did you also add in that $600 on the copy you sent in, or did you just list the property without putting—

A. I just listed the property.

Q. You didn't put any valuation on the statement you attached to the option at all?

A. I don't think I did.

Q. So that, when Colonel Valliant would see that $10,000 there he wouldn't know that that would include $600 of expenses?

Mr. O'Bryan: That is objected to as argument.

Judge Collet: Sustained.

By Mr. Blanton:

Q. This writing on the right-hand side— "6 fruit trees a lot of grapes all building electric equipped": Was that on the copy you sent to Washington, or just the typing?

A. Just the typing. I put that on afterwards, because I had made no charges for that and didn't add it in my property.

[fol. 245] Q. Do you know whether McDowell wrote anything, when they sent this option in, including the typewriting of Exhibit 7-B?

A. No, I do not.

Q. When the signed copy executed by Colonel Valliant, Government's Exhibit 7, was returned to you, did it have any of this typewritten matter added to it?

A. No, sir.

Q. Government's Exhibit 7 came back the way it is?

A. Yes.

Q. Did you have any argument with Mr. King about the price you were to get for the property, or did he just accept your figure of $9,400 as the value of the property?

A. No, sir; I had that list made out and he said, "I guess that will be all right." We never had no argument.

Q. He didn't try to get you to reduce it?

A. No, sir.

Q. Did you talk to Mr. Earl Sutton about the value you were going to put on part of this property, before you submitted these figures to Mr. King?

A. I think I spoke to him, yes, and asked him about what the property would be worth, that I could put up a building like that, and that is how I arrived at the figures.

Q. Do you also have any of the papers in the Seib-Wackher deal, Mr. Seib? A. Yes.

Q. May I see those, please?

(Witness here handed documents to Mr. Blanton.)

[fol. 246] Q. Of whom did the Seib-Wackher Company consist?

A. It consisted of myself and Mr. Wackher and Mr. Schneider.

Q. You were in the mercantile business in Hamburg?

A. Yes, general merchandise.

Mr. Watson: We object to all this testimony as to the Seib-Wackher matter.

Judge Collet: Overruled.

By Mr. Blanton:

Q. Is that the same Mr. Wackher who was just on the stand ahead of you? A. Yes.

Q. I hand you Government's Exhibits 8 and 8-A, and ask you if those are two of the copies of the option which was entered into by you and Mr. King, on behalf of McDowell. A. Yes.

Q. Government's Exhibit 8 seems to be the original which was accepted by Colonel Valliant?

A. Yes, sir

Q. The option itself seems to be dated November 19, 1940, is that correct?

A. I think that is the date.

Q. Now I hand you Government's Exhibit 8-B, and I will ask you what Government's Exhibit 8-B is.

A. That is the value we put on our store on the—do you want me to read it the way it is?

Q. No; I just want to ask you what it is.

A. That is on our property there and we added the loss we sustained on our stock by being forced to close [fol. 247] out and a loss of one year's salary by being put out of business, each one of our partners.

Q. I notice there are some figures in pen and ink, and a few words, on the bottom of Government's Exhibit 8-B: Whose handwriting is that, Mr. Seib?

A. That is mine.

Q. I notice you have included in this—check me and see if I read this correctly—you list on this Government's Exhibit 8-B the following:

"List of property owned by Seib Wackher & Co. one-half acre land in survey 3106 Township 45 Range 3 East on said ½ acre the following

* * * * *

1 General Store Building 42 x 60, 2 full story high, consisting of 4 rooms and basement—Electrically equipped with burglar alarm system, furnace and 2 cisterns, 7,125.-00", that is the value? A. Yes.

Q. "1 Barn 30 x 30—$400.00? A. Yes.

Q. "1 Corn Crib 10 x 14—$100"? A. Yes.

Q. "1 Coal shed and storage—$200.00"?

A. Yes, sir.

Q. 1 Fairbanks wagon scales—$125.00"?
A. Yes, sir.
Q. Did you go off and leave the scales on the premises when you left?
A. Yes; I guess it is there yet.
Q. Did you ask permission to move them?
A. No.
Q. Did you try to move them? A. No, sir.
Q. They could have been moved, could they not?

Mr. O'Bryan: We think this is a little far-fetched, if [fol. 248] Your Honor please, and we object to it for that reason.

Judge Collet: Overruled.

A. I guess we did, but we sold them with everything we had there.

By Mr. Blanton:
Q. You sold lock, stock and barrel, did you, Mr. Seib?
A. Yes.
Q. I notice you follow with the next item "Loss will be sustained on fixtures—$1,000.00": What did you mean by that? What was that thousand dollars supposed to cover?
A. All of our store fixtures we had there, including refrigerator and show-cases, counters, shelving.
Q. Did you move any of those? A. Yes.
Q. You moved them all, did you?
A. Moved—
Q. You moved them at the same time you did your stock of merchandise, did you not?
A. What merchandise was left—we sold some of the—show-cases there. I don't know exactly what we did get; I believe we got eight or ten dollars for one ten or twelve foot all glass show case. We couldn't use them.
Q. But they could be moved; they were personal property, were they not? A. Yes.
Q. I notice the next item you have included in this total is "Loss will be on stock of goods—$2,000.00": What did that represent?
A. That represented the loss that we had on closing out [fol. 249] of all our stock of goods that we had on hand.

Q. That was not part of the real estate, was it, Mr. Seib?

A. No, it was not part of the real estate. It was a stock of goods. We lost on it.

Q. You have listed on here "1 Years loss in salary of each partner $1,000.00 each $3,000.00": What did that represent?

A. That would represent that our salary was at least a thousand dollars a year and they put us out of business. We may not go into business or get a job for a year or, in other words, if we had sold our business to any individual we would have sold business with the right of doing business there.

Q. So, that $3,000.00 was for your loss of salary, your personal loss of salary? A. Yes.

Q. It was not a part of the value of the real estate, was it?

A. No; it was just personal.

Q. You have included in these figures here $3,000 loss of salary, $2,000 loss of profit on stock of goods, and $1,000 loss on fixtures, a total of $6,000, which didn't constitute any portion of the value of the real estate, did it?

A. No, it would not.

Q. And you also included this Fairbanks wagon scales, which I believe you say could have been moved, at $125.00?

A. We didn't know whether it could be moved or not. It is stationary. It was dug in the ground, on a rock foundation.

[fol. 250] Q. You moved it in there when you erected it?

A. Sure.

Q. And those are moved, are they not?

A. I don't know whether they are or not.

Q. The next item you have listed here, I see, is "Add commission for option and abstract Co.—$900.00": How did you come to put that in there?

A. Well, that was the commission that McDowell and the Abstract Company would receive. We was not going to pay it, because we didn't want to sell our property. We was not paying anybody for selling our property. We had it there for expense.

Q. How did you figure that $900—as expense on what items?

A. The whole item, I guess, we thought would be $900.-00. We didn't know how many stamps would be paid.

Q. You didn't aim to be out anything on the sale of the property?

A. No, sir, we didn't.

Q. That was the way you figured this, was it, and you included that commission and revenue stamps in this option price, although the option you signed stated that you were to pay the commission to the title company and to McDowell?

A. They took the commission out after we got the check.

Q. Did you have any discussion with Mr. King or with Mr. McDowell about including these various items in this option?

A. No, sir. We made an itemized bill just as it is there and they taken it along and made an option to that effect. [fol. 251] Q. And wrote in the sum of $14,850?

A. Yes.

Q. Which included all these items which I have referred to, that is, it included this wagon scale, loss on fixtures, loss on stock of goods, loss on a year's salary for all three of the partners, and included an estimate of $900 to cover the commission to McDowell and to the title company, and the revenue stamps and recording?

A. Yes, sir.

Q. Sir?

A. That is what it should have taken care of.

Q. Although you valued the real estate at $7,950.00, as you have written out here in pen and ink at the side of the paper?

A. That is what we taken off—that was our real estate, yes, and the others we had to figure in. That is the figures I put on there when I made out income tax and I taken off the real estate.

Q. So that you signed an option for $14,850, of which only $7,950, according to your own figures, represented real estate valuation, is that correct?

A. It represented the real estate—

Q. Now I hand you Government's Exhibit 8-C—

Judge Davis: What is the date of that option?

Mr. Blanton: That option is dated November 19, 1940, Your Honor, and seems to have been accepted by Colonel Valliant on November 30th.

Q. I hand you Government's Exhibit 8-C and will ask you what that is, if you will tell us, Mr. Seib, please.
[fol. 252] A. I think that is a general letter that was got out by McDowell. I imagine all of them in the area got one.

Q. That was telling you that your option had been accepted and to come and get your check, was it?

A. Yes, sir.

Q. I hand you Government's Exhibit 8-D, and I will ask you what that is.

A. That is a settlement sheet that was made down at the First National Bank in St. Charles, Missouri.

Q. That is the way the check for $14,850 was disbursed, when it came in, is that right, Mr. Seib? A. Yes.

Q. I notice that on the back of the settlement sheet it shows that R. Newton McDowell got $742.50 out of that: That represents approximately five per cent. of the total amount, doesn't it?

A. I suppose it does. That is what he has got on there.

Q. That is what he took, too, wasn't it? A. Yes.

Q. That is five per cent. of the $14,850, isn't it, and not five per cent. of the value of the real estate as listed in Government's Exhibit 8-B?

Mr. O'Bryan: That is objected to for the reason that the contract don't show—this option don't show it is just real estate alone they are buying. The option shows that whatever is on the real estate, and the prices may be set, whether on fixtures, or on scale, or coal oil or gasoline, or [fol. 253] anything else, and the five per cent. would be figured on the gross amount set up in the option, according to the provision of the option itself, and this is improper cross-examination.

Mr. Blanton: Have you read this option?

Mr. O'Bryan: Yes.

Mr. Blanton: I don't see anything about fixtures or loss of profits.

Mr. O'Bryan: But it sets up the maximum amount at the top, and he is to give a clear bill of sale, when he sets a price on whatever is there.

Judge Collet: Overruled.

Mr. Blanton: (to the witness) The Court says you may answer.

(Last previous question read as follows: "Q. That is five per cent. of the $14,850, isn't it, and not five per cent. of the value of the real estate as listed in Government's Exhibit 8-B?")

A. That is five per cent.

Q. And the Kansas City Title Company likewise took one and a half per cent. of the full amount, although their certificate of title was confined to real estate, didn't they?

A. Yes.

Q. You had figured all your property worth, when you gave this option to the McDowell setup at—

[fol. 254] The Witness: $14,850.

Q. No; that included $900, didn't it?

A. It included everything yes.

Q. You figured everything except this commission, at $13,950, did you not?

A. I don't know exactly what it figured out.

Q. Whereas, you got back $13,866.25?

A. That is what we got, yes, sir.

Q. That is between ninety and one hundred dollars less than the valuation you had put on your property, isn't it?

A. Yes, sir.

Q. Including your lost profits and your lost salary and your scale, isn't it? A. Yes.

Q. So that, he not only—he and the title company not only charged you six and a half per cent. on the valuation on your property, but also charged you six and a half per cent. on this $900 of expense, didn't they?

A. They charged five per cent. on the whole amount that the option calls for.

Mr. Blanton: I would like to offer in evidence Government's Exhibits 7, 7-A, 7-B, 7-C, which are the ones dealing with Mr. Seib and his wife's property, owned individual-

ly, and then Government's Exhibits 8, 8-A, 8-B, 8-C and 8-D, dealing with the Seib-Wackher Company.

Mr. Watson: I object to the admission of all of those documents, on the ground that they have nothing what-
[fol. 255] ever to do with the Mertia Callaway transaction.

Judge Collet: That raises a question. The objection will be overruled, but since this evidence is being offered for the purpose of illustration, how much do you have of this?

Mr. Blanton: We probably have a couple more witnesses along this line, Your Honor.

Judge Collet: Would it be appropriate to have a recess of ten minutes at this time, before you do that?

Mr. Blanton: Yes, Your Honor.

Mr. O'Bryan: I want to move to strike all this out.

Judge Collet: Motion denied.

(At this point a brief recess was had, after which the hearing was resumed.)

Government's Exhibits 7, 7-A, 7-B and 7-C, last offered in evidence, are in words and figures as follows, to-wit:

U. S. exhibit 7 is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 7-a is on file in the office of the Clerk of the Court of Appeals.

[fol. 256] Government Exhibit 7-B.

1940

List of Theodore Seib—Property—(Postmaster Hamburg Mo)

8000 Two Story House on Lot No. I H J. Seib Sub Division
7 Rooms
4 Rooms down stairs and a bath & toilet all modern,

3 Rooms upstairs with toilet,
I Vestibule with winding stairs to second floor,
I-Shower bath in basement
Furnace heated on first floor,
1200 2 Brick faced cottages on said lot no I
100 I Storage house
I Barn
The above all on lot No. I,
100 I Vacant lot No. 2 in H. J. Seib Sub Div,

9400
600 Expense

$10,000

6 fruit trees
a lot Grapes
all building
Electric Equiped

[fol. 257] Summary of Government Exhibit 7-C.

Government exhibit 7-C is the settlement sheet prepared by the representative of the Kansas City Title Insurance Company, covering Tract 100, sold by Theodore Seib and Anna Seib, in the sum of $10,000 set out in the option and disbursed as follows:

To R. Newton McDowell, commission	$500.00
Kansas City Title Company, certificate of title	150.00
recording fee	1.50
revenue stamps	11.00
miscellaneous charges (deed and 2 aff.)	1.00
Total	$663.50
Theodore and Anna Seib	9336.50

[fol. 258] Government's Exhibits 8, 8-A, 8-B, 8-C and 8-D, last offered in evidence, are in words and figures as follows, to-wit:

U. S. exhibit 8 is on file in the office of the Clerk of the Court of Appeals.

U. S. exhibit 8-A is on file in the office of the Clerk of the Court of Appeals.

[fol. 259] Government Exhibit 8-B

Theodore Seib — IGA

L. E. Wackher — Seib-Wackher & Co. — General Merchandise — Hamburg, Mo.

P. T. Schneider — Quality Service Low Price

Nov 16 1940

List Of Property Owned By Seib Wackher & Co.

One Half Acre Land In Survey 3106 Townshop 45 Range 3 East On Said 1/2 Acre The Following

* * * * *

I	General Store Building 42 x 60 2 full story high Consisting Of 4 Rooms And Basement—Electrally Equiped With Burgalar Alarm System, Furnace And 2 Cisterns	7,125.00
I	Barn 30 x 30	400.00
I	Corn crib 10 x 14	100.00
I	Coal shed and storage 12 x 50	200.00
I	Fairbanks wagon scales	125.00
	Loss will be sustained on fixtures	1,000.00
	Loss will be on stock of goods (inventory 14000.00)	2,000.00
I	Years loss in salary of each partner $1,000,00 each	3,000.00
xxx	Add Commision For Option And Abstract Co.	900.00
		$14,850.00

Option Sined Nov 19–1940

Real Estate
7,125 00 Bldg & Lot
400 00 Barn
100 00 Corn crib
200 00 Coal Shed
125 00 Scale

7,950 00

1/3/ 14850
4950 Each

[fol. 260] U. S. exhibit 8-C is on file in the office of the Clerk of the Court of Appeals.

[fol. 261] Summary of Government Exhibit 8-D.

Government exhibit 8-D is the settlement sheet prepared by the representative of the Kansas City Title Insurance Company, covering Tract 181, sold by Theodore Seib, L. E. Wackher, Paul T. Schneider, partners d/b Seib-Wackher & Company, in the sum of $14,850.00 set out in the option and disbursed as follows:

To R. Newton McDowell, commission	$7,742.50
Kansas City Title Insurance Co. certificate of title	222.75
recording fee	1.25
revenue stamps	16.50
miscellaneous charges (not. pub. fees)	.75
Total	7,983.75
Paul T. Schneider & Myrtle Schneider, Louis E. Wackher & Lydia Wackher, Theodore Seib & Anna Seib	13,866.25

[fol. 262] Mr. Blanton: Mr. Watson, with your permission I would like to ask Mr. Seib another question.

Mr. Watson: That is all right.

By Mr. Blanton:

Q. Mr. Seib, I will ask you if when this check from the Government came back in the full amount of that option, I will ask you if you had any argument on either occasion about charging you six and a half per cent. on the full amount of the check, either in connection with your own personal check, or in connection with the check for the Seib-Wackher property.

A. Well, my personal check, we went down and we signed the deeds in the Kansas City Abstract Company and we went to the Directors' Room at the First National Bank

and made the settlement. When we went—I think it was Mr. Lamkins, and he said "I have your check now, and we are ready to pay." I said, "All right; I will just take that check then." It was a check for $10,000.

I says, "I will give you my personal check for your commission and also for the charges", the way he had it figured out on that. I believe it was $500 and $163—whatever it was.

"I will give you your commission." I was going to give him commission on what I was getting.

Q. In other words, five per cent. on the $9400?

A. Yes, sir.

Q. And not on the $10,000?

A. I was going to give him a check for that and he said [fol. 263] no, he couldn't do that. I said, "All right". I guess—the way they had it on his check, or on the settlement sheet, that is what we got.

Q. Did you make any statement to him about the way he was figuring it, that he was charging you commission on commission?

A. I think I said something like that, that he was getting that.

Mr. Blanton: Take the witness, gentlemen.

Cross-Examination.

By Mr. Watson:

Q. Mr. Seib, was your property for sale?

A. How is that?

Q. Was your property for sale when these people approached you?

A. No, sir; I built that place and was supposed to live there the rest of my life.

Q. And you were given to understand that you were to fix the price at which you were willing to sell, isn't that true? A. Yes, sir.

Q. And in fixing that price you took into consideration a good many things; you took everything into consideration, did you not? A. Yes, sir.

Q. It was your property and someone was approaching you asking you to sell, and you fixed your price for the amount that you wanted for the property, taking all facts into consideration, isn't that true?

A. Yes, sir.

[fol. 264] Q. That was true with reference—you have been testifying just now about your real estate there that you owned in your own name? A. Yes.

Q. You testified here about the Seib-Wackher Company, did you not? A. Yes.

Q. Was that a corporation or partnership, or what was it? A. Partnership.

Q. It was a partnership. Did that partnership desire to sell its property?

A. No, sir; we didn't want to sell but, of course—

Q. Did it desire to quit business? A. No, sir.

Q. The business and real estate belonging to the business was not on the market, was it?

A. No, sir. I was in business there all my life from—well, for thirty years it took us to build up that trade that we had there, and we had a good established trade.

Q. Did you expect to stay there a good while longer in that business? A. Yes.

Q. And someone came and told you that the Government wanted to buy the property and wanted to know what you wanted for that property, isn't that true? A. Yes.

Q. And you realized that if you didn't sell the property it would be taken away from you, is that true?

A. We thought if the Government wanted the property, of course, we would have to sell. We would have to make—[fol. 265] that we would have to fix the option and make some deal.

Q. But you thought the Government was approaching you on a bargain and sale proposition, did you not; you thought that they were asking you what you wanted for the property? A. Yes, sir.

Q. That is, what the partnership wanted. Now, you, as a matter of fact, had never bothered your mind about what the market value of your business, of the business of that corporation was, or that partnership, or what the assets of that partnership, what the market value of that was, had you? A. No, sir.

Q. You had not considered the question of market value? A. No, sir.

Q. But you knew what it was worth to you, did you not, or you came to a conclusion about that?

A. Yes; we knew what the stock of goods inventoried, and something like that.

Q. You knew what you wanted for it, that is, after thinking it over? A. Yes, sir.

Q. You determined what you wanted for it? A. Yes.

Q. You didn't represent to anyone that that was the market value of that business, did you; you didn't say anything about market value, did you?

A. No. I told them that was what we wanted.

[fol. 266] Q. And you were asked to fix the price?

A. Yes.

Q. And you fixed a price, and when you fixed a price you took into consideration a great many things that you were going to have to sell at a sacrifice, did you not?

A. Yes; took into consideration what we would have to sacrifice by closing out our business, that we would be put out of business; that we had been there and worked up a good trade. Took it for granted it was just the same as if some individual would come and ask me, "What do you want for your business?" I said I wanted so and so much for the good will, for a business that is already established, and that is what we figured out by putting on—our good will, by putting on the—what we lost, the percentage that we lost, and by being put out of business; figured that as good will, selling to somebody else.

Q. Suppose something very speculative had entered into your mind; suppose it had occurred to you that maybe a year hence—

Mr. Blanton: Your Honor,—

Mr. Watson: It is permissible to show the state of mind of this witness.

Judge Collet: Finish your question.

Mr. Watson: Suppose it occurred to you that perhaps a year hence oil would be struck there: You would have given that idea of yours some consideration in fixing this [fol. 267] price, would you not?

Mr. Blanton: It is not what he would have done a year hence.

Mr. Watson: I am talking about what he would have done if he had been speculating on what was going to happen a year hence. He was the one that fixed this price. The Government was approaching him on a sale and bar-

gain basis. Market value has absolutely nothing to do with this question.

Judge Collet: I think if he had been speculating along that line the result of the speculation is not a part of the elements of market value.

Mr. Watson: But market value is not a proper consideration in this thing. The Government was approaching him to buy property that belonged to him, and he was under no obligation to limit his price to the market value of that. Had it been condemned then the law of condemnation would have come in and the question before the Court would have been market value.

Judge Collet: You might reframe your question and find out if he had anything like that in mind. In the present form—

Mr. Watson: I don't think he had anything like that in mind, Your Honor, for that matter. The thing I wanted to bring out from the witness—

[fol. 268] Judge Collet: In its present form, it is argumentative.

Mr. Watson: Very well. I will withdraw that question in its present form.

Q. But you took into consideration every element, every fact connected with that property, either directly or remotely, which affected your reluctance to part with it, in fixing your price, did you not, Mr. Seib?

A. That is on the total amount, yes.

Mr. Watson: Now, I think that is all.

Mr. Blanton: That is all, so far as we are concerned.

Edgar S. Albrecht, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please, sir.

A. Edgar S. Albrecht.

Q. I wish you would speak out. I am afraid the Court can not hear you. Where do you live, Mr. Albrecht?
A. In St. Louis.

Judge Moore: I can not hear a word he says.

The Witness: In St. Louis.

Mr. Gentry: What are your initials?

[fol. 269] A. E. S.

By Mr. Blanton:
Q. Did you, together with one of your brothers, own any property in the Weldon Springs area, which has been taken over by the Government?
A. With a cousin of mine.
Q. With a cousin of yours? A. That is right.
Q. What is your cousin's first name?
A. Alfred W.
Q. What was that property called in the area?
A. Well, it was known as the Weldon Springs Quarry property.
Q. Is that the property about which Mr. Langenbacher testified this morning? A. I believe it is.
Q. Did you execute an option to your property out there known as the Weldon Springs Quarry?

Mr. Watson: I object to any evidence in reference to the Albrecht Quarry deal, on the same ground as heretofore.

Judge Collet: Overruled.

A. Yes, we did.

By Mr. Blanton:
Q. Do you have any papers—did I ask you to bring in any of your papers? A. No, you did not.
Q. I will ask you if you placed a value on your property.
A. You mean, before we bargained with Mr. McDowell?
Q. Yes. A. Yes, we had decided on a value.
Q. Upon what had you based that value?
[fol. 270] A. Upon the value of the quarry and the future

possibilities of that property, its location, and the few buildings—that didn't amount to a great deal—which were on it.

Q. Was it you or your cousin that had this conversation with Mr. Langenbacher about which he testified this morning?

A. Neither one of us.

Q. It was not you, at least? A. No, it was not.

Q. There is just one Weldon Springs Quarry there?

A. Yes, that is right.

Q. Taking into consideration what was there in the quarry, and you say the possibilities of future earnings, what valuation did you place on the property?

A. We decided on a price of $35,000.

Q. Did you have an option in that amount?

A. No, we did not.

Q. What option—on what amount did you finally agree was the value of your property?

A. A little over $21,000.

Mr. Watson: I object to that on the ground that he said he fixed the value at $35,000, and I think if he agreed for less than that he agreed for less than he thought the value was.

Judge Collet: (Comment of the Court not heard by the reporter.)

Mr. Blanton: I hand you a letter which has been marked Government's Exhibit 9, and ask you if you received that letter from Mr. Bolton of Mr. McDowell's organization.

[fol. 271] A. Yes, that is right. We received that.

Q. You agreed with Mr. Bolton, did you not, Mr. Albrecht, upon a figure of $20,000 for the quarry?

A. Understand, I did not agree to anything with Mr. Bolton or Mr. McDowell, as my cousin did all of the negotiating for us.

Q. I see, but you got the letter?

A. I got the letter; that is right.

Q. Did you make the settlement with Mr. Bolton, or was that made by your cousin?

A. That was made by my cousin; however, subject to my approval.

Q. Do you know how much was actually paid to you?
A. We have not been paid.
Q. You have not been paid. This is one of the options which was held up? A. That is right.
Q. Did you discuss with your cousin these figures which are mentioned in Mr. Bolton's letter, before he signed the option?
A. Yes, we discussed those figures.
Q. And they were acceptable to you, were they?
A. That final figure of $21,000 and some odd dollars.
Q. It was based on a figure that would net you $20,000?
A. That is right.
Q. That is what you expect to get out of it?
A. A net figure of $20,000.

Mr. Blanton: I think that is all.

[fol. 272] Cross-Examination.

By Mr. Watson:
Q. I believe you testified that you valued that property at $35,000? A. That is right.
Q. You subsequently agreed to how much?
A. Well, the option was a little over $21,000.
Q. Was that what you thought the value of it was, or did you decide to take less than the value?
A. That is not the value we would have insisted on at a private sale.

Mr. Watson: That is all.

Mr. Blanton: I would like to offer in evidence Government's Exhibit 9, which reads as follows:—

Mr. Watson (after examining exhibit): I object to the acceptance in evidence of that document, for the same reasons heretofore stated. It has no relation to the Callaway transaction.

Judge Collet: That objection is overruled.

Mr. Blanton (reading Government's Exhibit 9):

"R. Newton McDowell
Home Office
Midland Building,
Kansas City, Missouri.

Land Optioner for
United States War Department

Telephone 1091
126 South Main
St. Charles, Missouri.

[fol. 273] December 5, 1940.

Mr. Edgar S. Albrecht,
721 North 2nd Street,
St. Louis, Missouri.

Dear Mr. Albrecht:—

This is in reference to the land you own within the T. N. T. Plant area at Weldon Springs, Missouri.

We have just completed a survey of your land, and, according to the survey, your own 55.82 acres in this area.

We are attaching hereto an option for $21,425.00 net cost to the Government, which will net you $20,000.00 after the commission and abstract charges have been deducted.

We are anxious to have all the options in this office as soon as possible, and we trust you will sign this option, before a witness, and return three copies to this office immediately.

Yours very truly,

R. NEWTON McDOWELL,
(Signed) D. M. Bolton,
D. M. Bolton, Mgr.,
Procurement Office."

I call your attention to the fact that $1,425 is exactly six and a half per cent, added to the $20,000.

Judge Davis: What is the date of that?

Mr. Blanton: The date of that is December 5th, 1940, Your Honor.

[fol. 274] DARBY TALLY, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please.

A. Darby Tally.

Q. Where do you reside, Mr. Tally?

A. St. Charles, Missouri.

Q. You are employed in the newspaper business, I believe? A. Yes.

Q. With what St. Charles paper do you work?

A. Cosmos-Monitor.

Q. Do you also act as a St. Charles reporter for the Globe-Democrat? A. Yes.

Q. I will ask you if you reported a mass meeting out at the Howell School House, which was held on or about November 6th, 1940.

A. Yes.

Mr. Watson: That is objected to on the ground that it is entirely irrelevant and incompetent to the case.

Judge Collet: Overruled.

By Mr. Blanton:

Q. Did you attend the meeting yourself, Mr. Tally?

A. Yes, sir.

Q. I will ask you if Mr. R. Newton McDowell was present at that meeting. A. Yes, sir.

[fol. 275] Q. Was Senator George Williams present at that meeting? A. Yes, sir.

Q. Do you know Mr. Ford Thompson, the gentleman sitting here, second from the end here, in the front row?

A. I don't know him by name, but I know him when I see him.

Q. Was he there at that meeting? A. Yes.

Q. Was Mr. Joe Wentger, former Prosecuting Attorney for St. Charles County, there? A. Yes.

Q. And many other people? A. Yes.

Q. I will ask you to state to the Court what was said at that meeting by Mr. McDowell about who was going to bear the expense of this five per cent. commission which he was to receive.

A. Well, Mr. McDowell—it was sort of an open forum, rather a wild one, and Mr. McDowell explained to the people that this extra cost would be on them and—

Q. You say would, or would not be on them?

A. Would not be on them. He pointed out as an example that if their property was to cost one thousand dollars that they were to add the five per cent. fee for his company and one and a half per cent, for the title company, and might submit a price of $1,065.

Q. I will ask you if you heard any questions asked, or [fol. 276] any discussion between Senator Williams and Mr. McDowell out at that meeting, or any statement made by Senator Williams in the presence of Mr. McDowell and the landowners out there.

A. Senator Williams got up and made a talk. I recall he told Mr. McDowell that he needed a good lawyer at that time.

Q. Did he give any reason why he needed a good lawyer?

A. Well, after he had made the statement how to handle the transaction.

Q. In connection with what, Mr. Tally?

A. The financial transaction.

Q. You mean, adding this five per cent, commission and one and a half per cent. commission? A. Yes.

Mr. Blanton: Take the witness.

Cross-Examination.

By Mr. O'Bryan:

Q. Mr. Tally, you gathered from the conversation and statements made by Senator Williams at this meeting that he was opposed to the Government establishing this area there for Governmental purposes?

A. It was my personal opinion.

Q. It was your personal opinion? A. Yes.

Q. You gathered that from everything that was said?

Mr. Blanton: I think his personal opinion of the matter wouldn't cut any figure. I ask that that answer be stricken.

[fol. 277] Judge Collet: Overruled. You are talking about his opinion about Senator Williams' attitude. Go ahead.

By Mr. O'Bryan:

Q. What you gathered from what Mr. McDowell said. He talked several times? A. Yes.

Q. And this was November 6th?

A. It was the early part of November. I don't recall the exact date.

Q. You were a newspaper representative, a reporter?

A. Yes.

Q. Mr. McDowell came to St. Charles on the 30th of October, didn't he? A. Somewhere around that date.

Q. It was only six or seven days later that this meeting was held out there? A. Yes.

Q. And this committee was there that night, too, that Mr. Sinock was chairman of—Mr. Sinock was there?

A. Yes.

Q. George Hackman? A. I don't recall.

Q. You don't remember George? Do you know him? He used to be State Auditor, or boss of Warren County.

A. Yes.

Q. A great many people were there? A. Yes, sir.

Q. And the discussion was that people wanted to know if they had to sell. A. That was one matter.

Q. Then when they were told by McDowell that the Government had selected that area and he was there to buy, they were told what price they could get, were they not?

A. He didn't tell them what price they could get.

[fol. 278] Q. They could get what they wanted for it, if it was not too high, couldn't they?

A. I don't recall that he told them just how much; some satisfactory arrangement.

Q. He told them, though, that whatever price they set upon their property that out of that price would have to me paid five per cent. commission to him and one and a half per cent. to the title company?

A. That is right.

Q. And he told them in advance that before they set the price for them to include in that price the five per cent. and the one and a half per cent.? A. Yes, sir.

Q. And the cost of recording the deed and the cost of stamps on the deed. The people were not deceived; they knew what they were going to have to set as a price?

A. Yes.

Q. They knew it was going to be an offer, he told them he had an offer—they must make the Government an offer, or should make the Government an offer, and that was to include in it what they wanted, and they must include in it enough to pay him five per cent., and the title company one and a half per cent., to pay these other things?

A. Yes.

Q. He didn't try to deceive them in any way?

A. I don't think he did.

Q. It was all open and above board and on top of the [fol. 279] table, wasn't it? A. Yes.

Mr. O'Bryan: That is all.

Redirect Examination

By Mr. Blanton:

Q. He was educating them up to it, was he not?

A. If that is what you call education.

Judge Davis: Would you mind asking the witness if the substance of that conversation was published in the Globe Democrat at that time?

By Mr. Blanton:

Q. What the substance of that conversation published in the Globe at that time? A. Yes.

Q. Is this the article, in the Globe of November 7th, 1940?

A. (After examining article) Yes, that is substantially it.

Q. That is substantially what occurred out there?

A. Yes.

Recross Examination

By Mr. O'Bryan:

Q. You wrote it?

A. I telephoned the story in to the office.

Redirect Examination

By Mr. Blanton:

Q. There was a rewrite man on the paper that wrote it up?

A. Yes, sir.

Q. But the facts stated in this article are substantially true and correct, are they not, Mr. Tally? A. Yes.

Mr. Blanton: I would like to offer this article—

[fol. 280] Mr. Watson: That is objected to as irrelevant and it has nothing to do with the Callaway transaction. There has been no evidence shown here that Miss Callaway was at that meeting.

Mr. Blanton: It is also competent as to not only what occurred out there, but also shows that the information was widespread through one of the leading newspapers of the city, which was widely circulated in St. Charles County.

Mr. Watson: It is objected to on the further ground that it constitutes a variance from the plaintiff's pleading in its reply, to the effect that this commission arrangement made between the landowner and McDowell was a secret arrangement.

Judge Collet: It would seem to me that you would not object. They charge fraud and secrecy and now they undertake to prove that everybody knew about it who could read the paper, and your objection—

Mr. Watson: I withdraw my objection, Your Honor.

Judge Collet: All right.

Mr. Blanton: I ask that this article be marked Government's Exhibit 10.

(The article of the St. Louis Daily Globe-Democrat of November 7, 1940, was thereupon marked Government's Exhibit 10.)

[fol. 281] By Mr. Blanton:

Q. In connection with this article, did Mr. McDowell say that the figure in the option was to be broken down so the War Department would be advised as to what went into that total figure?

A. Not to my recollection.

Mr. Blanton: That is all.

Recross Examination

By Mr. O'Bryan:

Q. Mr. Tally, did the St. Louis Post-Dispatch and Star Times also have a reporter there that night?

A. I think so.

Q. Did you see anything in the papers on the 7th, where the Star Times and Post also carried articles?

A. Well, they had an article about the meeting. I just couldn't recall—

Mr. O'Bryan: Mr. Blanton, have you got the rest of the articles?

Mr. Blanton: No, I haven't.

Mr. O'Bryan: You haven't been looking those up.

Judge Collet: Are there any further questions, gentlemen?

Mr. Blanton: No, Your Honor.

Judge Collet: That is all.

[fol. 282] ALBERT WEISMAN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. State your name to the Court, please.

A. Albert Weisman.

Q. By whom are you employed?

A. Globe-Democrat.

Q. I will hand you a document which I will ask to be marked Government's Exhibit GU-4, which consists of six pages. I wish you would look at that exhibit, if you will, please.

(Witness here examines last indicated exhibit.)

Q. Have you seen that article before? A. Yes.

Q. Where did you see it?

A. Well, Mr. McDowell gave it to me.

Q. Mr. R. Newton McDowell? A. Yes.

Q. Do you know about when he gave it to you?

A. Either January or February of '41, 1941.

Q. I notice there are some few pen and ink corrections on this photostat, for instance, the word "and" in the second paragraph of the first page, and the word "acquire" on the second page, and the word "never" on the third page, and three or four words that are written in on

the fifth page, and the word "a" in lieu of the word "the" on the sixth page: Were those corrections on at the time [fol. 283] the article was given to you, or did you make any changes?

A. They are not mine.

Q. They are not yours? A. No.

Mr. Blanton: Take the witness.

Mr. O'Bryan: You haven't offered it?

Mr. Blanton: Not now.

Judge Collet: Are there questions to propound to this witness?

Mr. O'Bryan: Yes.

Judge Collet: Proceed with the examination, please.

Mr. O'Bryan: We have no questions, unless we ask him about this.

The Court: That is all.

[fol. 284] Adolf A. Daniel, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. State your name to the Court, please.

A. Adolf A. Daniel.

Q. Where do you live, please, sir?

A. St. Louis.

Q. Did you own some property out in the Weldon Springs area? A. Yes.

Q. Of what did your holdings consist?

A. Well, twenty-nine hundred and some odd dollars. I don't know exactly.

Q. Did you own farm land out there?

A. No, sir. I owned three acres. I didn't call it farm land.

Mr. Watson: We make the same objection to this testimony, Your Honor.

Judge Collet: Same ruling.

By Mr. Blanton:

Q. You say you owned a three-acre parcel?

A. Yes, sir.

Q. Where, in the area, was it located?

A. Right close to the Missouri River at Hamburg.

Q. Did you negotiate with a representative of Mr. McDowell's office over an option to that property?

[fol. 285] A. Yes. Not at the office; at my property.

Q. Pardon me?

A. Not at Mr. McDowell's office.

Q. A representative of McDowell came to you?

A. Yes.

Q. Did you operate a place of business on your property?

A. No, sir.

Q. He came to your home? A. Yes, sir.

Q. What value did you put on your property?

A. $2,750.

Judge Collet: How much?

The Witness: $2,750.

Mr. Blanton:

Q. You figured that was the full value of your holdings, did you?

A. Yes, sir.

Q. For what amount was the option written?

A. Twenty-nine hundred and something. I don't know just exactly.

Q. Can you tell us what was the difference between the value you placed on the property, of $2,750, and the amount of the option; what made up that difference?

Mr. Watson: I want to move to strike this testimony out at this time, because Mr. Blanton's constant question as to what value they placed on the property pre-supposes that the price fixed was based on value. The price fixed was based on what the man wanted for his property.

Judge Collet: The motion to strike is overruled.

[fol. 286] Mr. Blanton:

Q. Have you the question in mind?

(Last previous question read to the witness.)

A. Six and a half per cent was added to it for commission and notary fees.

Q. Was there also added revenue stamps?

A. If there was, I never heard anything about it. I never heard anything about it. It was not many questions asked me. I just told what I wanted and it was fixed up.

Q. There was no argument between you and him about what the property was worth?

A. No, sir. That is what I thought it was worth, that is what I wanted, and I asked for it.

Q. Did this negotiator make a statement to you, after it was written, of how high he would have gone with you, if you had asked?

A. He said he would like to add fifty dollars an acre more for the land, and I said that was all I wanted. There was nothing asked about the amount. I figured the amount; I figured the amount, and the amount was $2,750.

Q. He indicated he would give you $150 additional?

A. He said it would be worth fifty dollars an acre more for the land. He didn't say he would give it to me.

Judge Collet: Who was that man?

The Witness: I really don't know his name.

Judge Collet: Was he the man who signed the option with you?

The Witness: Yes, sir.

[fol. 287] Judge Collet: And at the same time, after you had alread signed it up?

The Witness: Yes, sir.

Mr. Blanton: Your Honor, I think I can get that option. That was involved in case No. 786. I will be very glad to get that option. I have that option and I will be glad to supply the Court with it. If there is no objection, I can go and get it now, if you will not object to the fact that the witness wouldn't be on the stand at the time I make the offer.

Mr. Watson: I won't object on that ground. I object, you understand—

Mr. Blanton: I understand, on the ground you have been making objections.

Take the witness.

Mr. O'Bryan: We can't cross-examine the witness now until you bring in that option, so as to see what we want to inquire about.

Mr. Blanton: The Court simply asked who it was, and I want to offer the option to show what representative of McDowell it was who signed it.

Judge Collet: Is there any cross examination?

Cross-Examination.

By Mr. O'Bryan:

Q. You signed the option? A. Yes, sir.

[fol. 288] Q. And was the price set out in the option, to be paid?

A. Yes, sir.

Q. Has that option been paid?

A. No, sir; it has not.

Q. But the amount set out there is what you would get, plus the commission, plus the other fees?

A. Yes, sir.

Q. Where did you live out there?

A. Hamburg, Missouri.

Q. What did you do?

A. I worked for the St. Louis branch of the Curtiss Manfacturing Company. I have been there eighteen years.

Mr. O'Bryan: That is all.

Mr. Blanton: Mr. Daniel, if you will come down now, then I may have to call you back. We will permit Mr. O'Bryan to further examine him.

Mr. O'Bryan: I don't think we will.

Mr. Watson: I may want to examine him.

[fol. 289] Ford W. Thompson, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Thompson, state your name to the Court, please, sir.

A. Ford W. Thompson.

Q. I believe you live here in the city, do you, Mr. Thompson?

A. Yes.

Q. By profession, you are an attorney? A. Yes.

Q. How long have you been a member of the Bar of the Supreme Court of the State of Missouri?

A. Thirty-four years.

Q. And have been a member of the Bar of this Court for a long period of time?

A. Same length of time.

Q. Mr. Thompson, I will ask you if you were present at this mass meeting out at Howell, which the evidence indicates was held on the night of November 6th.

A. I was.

Q. I will ask you if you heard a statement made by Mr. McDowell at that meeting as to how these commissions were to be handled.

Mr. Watson: That is objected to on the same ground as heretofore.

Judge Collet: Same ruling.

A. Yes, I heard it.

[fol. 290] Mr. Blanton: I wish you would state what occurred on that occasion, in connection with those discussions of those commissions, please, sir.

A. Well, there were a great many people present, and quite a number of lawyers. The meeting was opened and the purpose of the meeting was stated by one of the men, whom I didn't know, other than Mr. McDowell, and then Mr. McDowell made an explanation of the occasion, why he was there, and what the Government was trying to do, and he said that he was very anxious, indeed, to obtain options on the property, and he had a form of contract, which he explained, and he said that that contract contained a statement that he was to receive five per cent. commission on the amount, and there was also to be a charge of one and one-half per cent for an abstracting company, or a total of six and one-half per cent, and that he had a contract with the Government covering it; that that amount was to be added by him to what he thought was the value of the property. And he explained that the owners, who all stated

that they were in a position of people whose property was being taken away from them, and, therefore, they didn't want to pay anybody a commission for doing it, he explained to them that his commission of six and a half per cent would be added.

Q. Added to what, Mr. Thompson?

A. To what he conceived to be the value of the land. [fol. 291] After he had made that statement, I think that Mr. George Willson first asked him about it, and he repeated the statement that it was to be added to what he conceived to be the value of the land.

As I had had a great deal of experience in condemnation suits, I was a little curious to ascertain how McDowell fixed a value—

Q. Before you get to that, was there anything that he discussed in connection with the statement he was going to add this to the value of the land; the fact that the option which these property owners were going to be called upon to sign provided they were to pay the commission?

A. I was about to say that I asked why was it to go in there. I said, "why does it appear that it is to be paid by the sellers, paid to him by the owners?" He said that was a form that had been approved by the Government and that it was all understood that he was to add that to what he conceived to be the value.

As I say, Mr. Willson then asked him a good many questions about it, and he said that again.

I was very anxious to find out how he arrived at his value, even if he was going to add six and a half per cent. to it, so I asked him a great many questions. I think I asked him more questions than anybody else. I wanted to know [fol. 292] how he got that value, and what his experience had been. He said the Government was very anxious to get the land quickly, that he realized that it would be a great hardship for those people to be taken off their property in the middle of the winter; that there were many elements that he was taking into consideration in fixing those values that were probably not recognized by law, naming some of them.

Q. What did he name?

A. The cost of removal, of getting off the property. Taking off their personal property. Then I asked how he

got at a value. I remember, for instance, being curious to ascertain what was the man's knowledge of the subject. I don't mind stating that I thought at the time he didn't have any, and I was trying to find out if he did, so I gave him a question and I asked him—I remember this one very well—I said, "Suppose if somebody down there owns a little piece of property on which there is an oil station and he has owned it for a number of years, and after charging out every expense of every type and character, taxes included, it shows a profit to him, after paying all operating expenses, of about three thousand dollars a year, and that was its greatest and best potential use." I asked how would he value such a piece of property. Well, he said he would take into consideration that it was valuable for a certain purpose; that he would capitalize those earnings [fol. 293] in some manner—he didn't know exactly how, but when he reached that kind of a case he would solve it. But he was very earnest in his statement that he was anxious to get the property as quickly as possible and to pay a fair sum for it.

I recall that right after that Mr. Williams made a statement—

Q. That is, Senator Williams?

A. Senator Williams, and he told him that it looked to him—he didn't believe that the Government had entered into such a contract, or knew anything about it, and he notified everybody that was there that, in his opinion, they would be aiding and abetting in a fraud on the Government if they obtained options containing a six and a half per cent. figure over and above the true value of the property, and he did say in so many words that he thought he was a man who was in very great need of a criminal lawyer.

Mr. Blanton: Take the witness.

Cross Examination.

By Mr. O'Bryan:

Q. That was the night of November 6th, was it not, Ford?

A. I don't remember whether it was. I remember the occasion. I think it was November, early in November; the 6th or 7th; one or the other.

Q. You had a lot of friends and clients in that locality, did you not?

A. No, I didn't.

Q. You just heard about it and went out?

[fol. 294] A. Well, I knew some people who, I thought, when they waked up would find that their property was going to be taken away from them, and they would probably drift into my office. I wanted to be a little bit informed when they did.

Q. We just got through with our race for Circuit Judge at that time, too. You listened to everything McDowell had to say: Was there anything misleading in what he said, in your opinion?

Mr. Blanton: That calls for the witness' conclusion. I think he can state—

Judge Collet: Reframe the question.

Mr. O'Bryan:

Q. He explained to them in detail the price that they could get for the property?

A. Yes, he told them how—that they were not required to pay that commission, that that was going to be added on to the figure that he approved. He also—I asked him who approved these contracts and he said they were approved in Washington. I said, "where do you get your information as to value, other than that that you have yourself?"

He said, "I have a great many other people associated with me, who know what I may not know about value, and I recommend these values to the Government at Washington."

And he was asked two or three times, and made no secret whatever of the fact that if the property, in his [fol. 295] opinion, was worth $10,000 he would add $650.00. The specific illustration was put before him and he said, "Yes", and that the check that the Government would pay would be $10,650, and the owner would receive the $10,000 and he, under that contract, would get $500 and the Abstract Company would get $150.

Q. He had that contract out there?

A. Yes, he had those before him when we were asking him questions.

Q. You were examining him from that? A. Yes.

Q. This was a mass meeting of all those people?

A. I suppose there were a thousand there.

Q. Not all of them owners of land, but it was for all the people?

A. I don't know how many were owners of land. but there were about a thousand people. It was a large gymnasium and it was full.

Q. It was held for the benefit of those people to be informed that that area had been designated and selected as the place to build this TNT plant?

A. Yes. There was another question that came up; I believe I brought it up. I said, "Well, under the present law the Secretary of War has no right to condemn this land except in time of war, or war being imminent." We laughed a little bit about the isolationists, who claimed that war was not imminent. That unless they had such a situation as that they had not the power to take it, unless it was found that war was imminent. We talked about that, [fol. 296] and I remember suggesting to them that it looked to me that it was the patriotic thing to do, if they were offered a fair price for the property, they ought to expedite the matter. And I called their attention to the fact that if the Government condemned the land they would have to employ lawyers and probably there would be a delay in getting their money, and it seemed to be a plan to pay them immediately, and suggested that if the amount that was offered, for which a fair option could be obtained, why, that they accept the offer.

Q. You also suggested to them that they include in their offer the amount which they wanted net to themselves, plus all these expenses?

A. No, I didn't.

Q. You didn't? You didn't think there was anything criminal in putting that in there?

A. No, but I was greatly surprised that the Government would ever consent to such a thing, and I said so.

Q. That was a new one the Government had, up to that time?

A. More or less of a new Government plan, yes, but I was very much surprised that the Government would pay anybody five per cent commission in a matter of this sort.

Q. But you saw the contract.

A. I saw the contract, and he explained that it was an arrangement that he had made with the Government. I didn't go as far with him as Senator Williams, when he suggested that he didn't believe it.

[fol. 297] Q. Williams didn't believe it. You knew better?

A. He didn't believe the Government ever did consent to it.

Q. Ford, you knew better?

A. I only saw the form. I asked him, I said, "when you send in this option is it going in in this form which says you are going to get five per cent. commission?" And he said, "yes."

Redirect Examination.

By Mr. Blanton:

Q. The contract that you referred to, that you saw, is the option form of contract?

A. Yes.

Q. That is what you were referring to. That option provides that the property owner shall pay the five per cent?

A. Yes, it does. That is the reason—

Q. McDowell was explaining that, notwithstanding that provision in the contract, that they were not going to pay it but that they would handle it in such a way that the Government—

A. No. He said the Government had consented to that, and it was that statement of his, that the Government had consented that six and a half per cent might be added to the figure that he figured was the full value of the land, that rather amused me. I didn't think it was true.

Q. In other words, what he was telling you was utterly inconsistent with the printed form in the option?

A. Yes.

Mr. Blanton: That is all.

Mr. O'Bryan: That is all.

[fol. 298] Adolf A. Daniel, Recalled, having been heretofore duly sworn and testified, resumed the stand and tes-

tified further on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. I hand you a document which is in Case 786, pending in this court, which I will ask to be marked as Government's Exhibit 11. I notice that this seems to be a photostat. Is that a photostatic copy of the option you signed?

A. I signed it, I guess it is.

Q. That looks like it? A. Yes.

Q. It seems to bear the signature of E. S. Austin: Who is Austin?

A. I wouldn't know him if I would see him. I guess that is the guy I signed the option for.

Q. The fellow that came to your property to talk to you; is that the fellow who signed as a witness?

A. Signed as a witness?

Q. Yes. A. Yes, sir.

Mr. Blanton: For the information of the Court, I will now offer Government's Exhibit 11. That shows the amount —

Mr. Watson: That is objected to on the same ground heretofore interposed to like evidence.

Judge Collet: Same ruling.

Mr. Blanton: I think that is all, unless Mr. Watson [fol. 299] or Mr. O'Bryan desire to ask something further.

Mr. Watson: That is all.

Mr. Blanton: That also shows the exact amount of the option, which he was unable to recall. It shows the option to have been for $2,990.18, and seems to have been executed November 16, 1940. It was accepted by Valliant on the 27th of November, but it was signed by Daniel and Austin on the 16th and sent to Washington, and approved by Valliant on the 27th.

Government's Exhibit 11, last offered in evidence, is in words and figures as follows, to-wit:

U. S. Exhibit 11 is on file in the office of the Clerk of the Court of Appeals.

[fol. 300] JOSEPH WENTGER, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. I believe your name is Joseph Wentger?

A. Yes, sir.

Q. You live in St. Charles? A. Yes, sir.

Q. You are by profession a practicing attorney?

A. Yes.

Q. And have been for several years? A. Yes.

Q. I believe you also were former prosecuting attorney of St. Charles County, weren't you, Mr. Wentger?

A. That is correct.

Q. Do you represent any of the property owners in this Weldon Springs area? A. At present? No.

Q. Then you are not interested in these condemnation cases, as an attorney? A. No, I am not.

Q. I will ask you if you were present at this mass meeting held at the Howell School, which the evidence indicates was held on the night of November 6th, 1940.

A. I was at the meeting attended by Mr. McDowell.

Mr. Watson: I interpose the same objection as heretofore.

Judge Collet: Same ruling.

[fol. 301] The Witness. At a meeting attended by Mr. McDowell, Mr. Thompson, Mr. Williams, and a number of other attorneys.

By Mr. Blanton:

Q. I will ask you, Mr. Wentger, to state what your recollection is of the conversation that was—the statement that was made by Mr. McDowell there about how this commission was to be handled.

A. My memory is that some lady had asked Mr. McDowell how it was that the people there had to dispose of their property, and that he would receive a five per cent. commission. My further memory is that he replied that that was the method and plan set up by the Government, or the War Department. Further on, there were some other questions asked by various persons, but I don't have

any recollection that he ever explained as to whether or not that commission would be added to the price. As I recall it, he did make some explanation of some of the factors that would go into determining the price.

Q. Such as some of the disturbance factors; what did he say about that, Mr. Wentger?

A. Well, he would take into consideration the fact that a person had to move, that it was some expense and trouble, and that was quite a disturbance to a person, was a loss of time and money and expense.

Mr. Blanton: Take the witness.

Cross Examination

By Mr. O'Bryan:

Q. He explained to them that the Government would, [fol. 302] if they offered these offers to purchase, take into consideration their condition and circumstances and inconvenience, in setting a price upon the property, didn't he, or words to that affect?

A. That is correct; the expense of removal, loss of crops, taking care of tenants, and factors of that sort.

Q. Settling up whatever was necessary in order to get from that property on to the other property. Now, Mr. Wentger, do you remember you were at a meeting when a man named Ringland was present?

A. I don't know the gentleman and I don't recall whether he was there or not.

Q. Were you ever at a meeting when Mr. Woods was present, from the Farm Securities Administration—and several of his people?

A. I don't think so.

Q. You were not there at that time. That is all.

Mr. Blanton: That is all, Joe.

[fol. 303] Frank Edwards, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. Mr. Edwards, state your name to the Court, please.

A. Frank Edwards.

Q. Where do you live?
A. Labadie, Missouri.
Q. By whom are you employed at this time?
A. United States Government, War Department.
Q. In the Engineer Corps? A. Yes.
Q. Doing river work on the Missouri River?
A. Yes, sir.
Q. I will ask you if you owned some property in the Weldon Springs area at one time.

Mr. Watson: I object to this testimony for the same reason heretofore stated.

Judge Collet: Same ruling.

Q. I will ask you if you had one of these options that was executed between yourself and Mr. McDowell's organization. A. Yes, sir.
Q. That option, I believe, was not paid, was it?
A. No, I—later on transferred it to the Government.
Q. You re-negotiated the matter with the Government at a later date, not through Mr. McDowell at all?
A. No.
[fol. 304] Q. I hand you a document, which I will ask to be marked Government's Exhibit G-3, and call your attention to what purports to be a photostatic copy of a letter dated May 27, 1941, on a copy of a letterhead of R. Newton McDowell. I wish you would look at this letter, please.
A. (After examining letter) That is it.
Q. Did you receive the original of that letter?
A. Yes.
Q. Do you have the original with you? A. Yes.
Q. May I see it? A. Yes (producing letter).
Q. I will ask you, is this document which you just handed me the original letter you received?
A. That is it.

Mr. Blanton: I will ask that this be marked Government's Exhibit G-3-A. (Said letter was marked as requested.)

Q. Had you written Mr. McDowell a letter dated about May 19th, to which this was a reply?

A. I wrote him a letter some time in May. He was not in the city. I guess I waited a week or ten days before I got an answer.

Q. How did you receive this, was it received by you through the mail? A. Yes, sir.

Q. Do you have the original envelope in which it came?

A. No, I don't believe I have.

Mr. Blanton: I now would like to offer in evidence this Government's Exhibit G-3-A.

[fol. 305] Mr. Watson: I would like to ask for what purpose?

Mr. Blanton: It is no reflection on you, Mr. Watson. I absolve you from any connection with the letter, but it is offered for the purpose to show that Mr. McDowell was undertaking to stir up litigation in this matter, although he was purporting to represent the Government.

Mr. Watson: I object to that on the ground that the question as to whether Mr. McDowell was stirring up litigation against the Government at this particular time, after his employment by the Government had terminated, is entirely irrelevant and immaterial to this proceeding. There is a reference to myself in that letter, to which I have no objection whatever.

Mr. Blanton: I didn't mean to impugn your motives or conduct at all. I think they have always been the highest.

Mr. Watson: I don't believe I want to withdraw the objection.

Judge Collet: Make up your minds, gentlemen.

(Here ensued private colloquy between Mr. Watson and Mr. O'Bryan.)

Mr. Watson: My objection stands, because it makes no difference whether McDowell stirred up litigation against the Government at this particular time, or not. It is ir-[fol. 306] relevant to the issues here and I object.

Judge Collet: That is my tentative conclusion about it.

Mr. Blanton: Mr. McDowell contends that he has rights under these contracts.

Judge Collet: The letter may be in the record in one form or another, and so it may be admitted, subject to the objection.

Mr. Blanton: The letter is on the letterhead of R. Newton McDowell (reading Government's Exhibit G-3-A):

"R. Newton McDowell
Incorporated
General Contractors

R. Newton McDowell, President

Midland Building
Kansas City, Missouri.

May 27, 1941.

Mr. Frank Edwards
Weldon Springs
Missouri

Dear Sir:

Due to my absence from the city answer to your letter of May 19 has been delayed.

Needless to say, I regret more than anyone the actions of the Government in repudiating its obligations. I regret that it is necessary for you to secure a lawyer in filing an answer to condemnation filed by the Government. Many attorneys are being used in connection with this litigation and under normal circumstances I would not think of suggesting whom you might employ and am not urging you to employ Mr. Watson. My office in St. Charles advises me that Mr. Samuel M. Watson, who lived in the area for [fol. 307] many years and recently has been condemnation attorney for the City of St. Louis, has opened an office in Weldon Spring and he is handling some forty or fifty of these cases. In view of the fact that your letter heads shows that you live in Weldon Springs you might like to discuss it with him. My St. Charles office has talked to many attorneys in St. Louis and we are doing everything we can to see that the farmers are paid in full.

I am sorry to remind you that I concluded all of my part of the arrangements in connection with my 5% commission and your check was available to you at St. Charles and you were so advised by my office. For reasons I know about you did not wish to take down this check. In other words, if you had come in at the time you were notified you would have been paid in full and I would have received my commission. Therefore, while I regret the situation exceedingly yet the fact that you did not receive your money is no fault of mine as it was available to you for several days.

Yours very truly,

(Signed) R. NEWTON McDOWELL."

Take the witness.

Mr. O'Bryan: I don't want him.

Mr. Watson: No questions.

[fol. 308] LEO T. BRIECE, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Briece, state your name to the Court, please.

A. Leo T. Briece.

Q. Where do you reside?

A. Kirkwood, Missouri.

Q. You are connected, I believe, with the Division Office of the State Highway Commission, or you were at one time? A. Yes, I was at one time.

Q. For how long a period of years were you so connected?

A. From August the 1st, 1932, to March 13, 1942.

Q. Mr. Briece, I will ask you if you knew Mr. D. M. Bolton, who was a member of Mr. McDowell's organization out there at Weldon Springs. A. Yes, I knew him.

Q. I will ask you if you had a conversation with him relative to his knowledge of land values out there.

A. Yes, I did.

Q. State to the Court what statement he made to you about his knowledge of land values, when he was entering

into these negotiations with McDowell, on behalf of these parties.

Mr. O'Bryan: That is objected to as hearsay testimony, conversation between two parties, neither of whom are parties to this litigation.

[fol. 309] Mr. Blanton: Bolton was office manager for McDowell.

Judge Collet: Overruled.

A. He said he didn't know anything about the land values in that community.

By Mr. Blanton:

Q. What statement did he make about the other people who were assisting him, as to their qualifications?

A. He said that the people that were going to assist him in acquiring this land were employees of Mr. McDowell, and had worked in a capacity such as concrete foreman and paving superintendents on contract work that Mr. McDowell had done.

Q. I don't believe the Court can hear you, Mr. Briece.

A. Mr. Bolton, at the time I had the conversation with him, said that the people who were going to assist him in acquiring the land were employees of Mr. McDowell and had been engaged as concrete foremen, paving foremen and superintendents upon construction work that Mr. McDowell had performed.

Mr. Blanton: Take the witness.

Mr. O'Bryan: I would like for this witness to stand aside for interrogation tomorrow morning, under the circumstances, for cross-examination.

Judge Collet: What circumstances, Mr. O'Bryan?

Mr. O'Bryan: Out of a clear sky comes testimony of this kind, and it is testimony that I am not prepared to meet on cross-examination, but I do want to cross-examine [fol. 310] a witness who testifies as this witness has testified.

Judge Collet: Well, it is so near the time of adjournment that we will accommodate you by giving you time to prepare for your cross-examination.

Judge Davis: Mr. Blanton, we have a naturalization docket in this room tomorrow morning, Thursday morning and Friday morning, three mornings in a row. There is a very large class—one hundred and twenty-five, I think. We hope to have that over with—and I am sure we will—by ten o'clock so that, if your witnesses and other interested parties postpone their appearance here until about court time they will probably not meet any inconvenience, but if they come into the courtroom at nine-thirty tomorrow they will probably find inconvenience. We suggest that the witnesses interested in these cases come at about ten o'clock, instead of coming earlier.

Mr. Blanton: If Your Honor wants to transact the formal business of the court, we might suggest that they come at quarter after ten.

Judge Davis: No, I think not. We hope to be through with the naturalization docket and hope they will be entirely away from here before ten o'clock.

Adjourn until ten o'clock tomorrow morning.

At this point, at five o'clock P. M., an adjournment was taken until April 1, 1942, at ten o'clock A. M.

[fol. 311] Met, pursuant to adjournment as above, on April 1, 1942, at ten o'clock A. M.

Appearances: Same as heretofore noted.

Mr. Blanton: Mr. Briece, will you come around again, please?

Cross-Examination of Leo T. Briece.

By Mr. O'Bryan:

Q. Mr. Briece, give your full name. I didn't get your name.

A. Leo T. Briece.

Q. B-r-e-e-c-e? A. No, B-r-i-e-c-e.

Q. You say you worked for the State Highway Department at one time? A. Yes.

Q. How long?

A. From August 1, 1932, to March 13, 1942

Q. Where were you living when you went to work for the State Highway Department?

A. I was living at Valley Park, Missouri.

Q. Born and raised in St. Louis County?

A. No; I was born in St. Louis and raised there.

Q. You worked for the State Highway Department up until what time? A. March 13th of this year.

Q. Where were you stationed in 1940, for the State Highway Department? A. At Kirkwood, Missouri.

Q. Whereabouts in Kirkwood was your office?

A. 329 South Kirkwood Road.

[fol. 312] Q. And you were living then where?

A. 516 Goethe Avenue, Kirkwood.

Q. You testified yesterday as to a conversation you had with Mr. Bolton: Where did that conversation take place?

A. In a hotel at St. Charles, Missouri.

Q. Were you staying at the hotel at that time?

A, No, sir.

Q. Had you ever met Bolton before? A. No.

Q. You never saw him before? A. No, sir.

Q. What brought about that conversation?

A. Well, the State Highway Department had some condemnation suits in St. Charles County and I was in charge of the Land Acquisition Department for the State Highway Department at Kirkwood, the Division Office. I was in the Circuit Clerk's office on this particular day and Mr. Sutton, the Circuit Clerk, mentioned the fact that Mr. Bolton, who was in charge of the land acquisition activities for the new ordnance works area, was in town. I made inquiry as to where he was staying and he told me at the hotel in St. Charles, which is just down the street from the court-house. So, I went down to the hotel to make myself acquainted with Mr. Bolton, just as a matter of courtesy, and offered any help to him that we could furnish, since we had a great many records of transactions of lands in St. Charles County that we had acquired for state highway [fol. 313] purposes. I went into the lobby of the hotel and asked for Mr. Bolton. An elderly gentleman, who was on duty there as clerk, asked me my name and I told him, and that I was with the State Highway Department, so he called Mr. Bolton on the telephone and asked him if he would see me, and then he gave me the room number and I went up in the elevator and knocked on the door.

Q. And met Mr. Bolton?
A. And met Mr. Bolton.
Q. Just tell me again what happened in that room?
A. Well, Mr. Bolton was staying at the hotel. They had not established any office in St. Charles as yet. And I introduced myself and gave him one of my cards and told him that I understoood that he was going to be in charge of the land acquisition activities for the Weldon Springs ordnance works and that I was connected with the State Highway Department, and had been for some time, and if we could be of any service to him in the way of furnishing him any information or plats, or data that we had in that area, I know that I myself would be glad to furnish them to him and I was sure the Division Engineer, Mr. Hodgman, would feel the same way about it. He expressed his thanks for the offer and said that he was not familiar with the land in St. Charles County, that this was new work to him, and that he might have occasion to take advantage of my offer. We discussed—I spent about between forty-five minutes and an hour there, I presume. At that time McDowell's [fol. 314] company had a contract, or had just got it, for the construction of, I believe, 54, out of Jefferson City. We talked a little bit about construction work.

I recall that a telephone call came in for Bolton, apparently from his home office, and with some person, apparently a young woman, on the other end of the telephone, he was exchanging comments about "Well, you will soon be down here", and then he made some comment about getting the office furniture and fixtures and general set-up for the materials that were required to set the office up in St. Charles.

Q. What day of the month did that happen?
A. I don't know, Mr. O'Bryan. I can, generally, fix the time. It was just before they established their office in St. Charles, and it was in the latter part of August or first part of September. It was a warm, sunshiny day.
Q. The latter part of August or first part of September? A. That is my best recollection.
Q. How long did you stay there in the room, did you say?
A. I got there about two-thirty in the afternoon and I would say I probably stayed until three-fifteen or three-

thirty, because I know I had time enough to get back to our office before it closed at four-thirty.

Q. At that time, you say McDowell had not opened up any office in St. Charles?

A. As far as I know, because Mr. Bolton was making [fol. 315] arrangements for opening the office then.

Q. You stated in your direct examination yesterday that Bolton told you, in your conversation with him at St. Charles, that he didn't know anything about the real estate business?

A. No, I didn't say that. I said he didn't know anything about the value of land in St. Charles County. He was not familiar with it.

Q. You further stated—

(To the reporter) Will you turn back to his evidence there, and if the Court will permit me, I want read exactly what he did state here on the stand.

Mr. Blanton: The record speaks for itself as to what he did state yesterday. I think that is improper cross-examination.

Judge Collet: (to Mr. O'Bryan) Go ahead with your examination.

By Mr. O'Bryan:

Q. You stated in your examination yesterday that Bolton told you that McDowell had cement builders and foremen and workmen down there on the job that knew nothing about the real estate business, acquiring this land and putting a value on it?

A. No, I didn't say he had said he had those people who knew nothing about the business. He said—I made specific inquiry of him who was going to handle the actual detail [fol. 316] land acquisition activities for him, and then he told me that he was going to use contract superintendents and foremen, and the reason I made that inquiry was this: At that time we had two men who had left the employ of the Highway Department, Mr. Banning, who lived at Kirksville, and Mr. Hartwell, who lived at that time at St. Clair. They left the Highway Department and were employed by the Shell Oil Company in their right of way activities for pipe lines, and I had Mr. Banning and Mr. Hartwell in mind, when I asked him, and then when he

told me they were going to use these people who had worked on contract construction work, I told him why I had asked the question; that these two men were available because Shell was laying off their land acquisition force on pipe line projects.

Q. You said yesterday that they were using men who were cement mixers and foremen, who knew nothing about the real estate business, did you not? A. No, sir.

Q. You didn't say that? A. No, sir.

Q. You didn't use the words "cement mixers", yesterday? A. I said pavement superintendents.

Q. Did you say anything about cement? A. No, sir.

Q. You say that conversation took place the latter part of August or first part of September?

A. That is my best recollection of it.

[fol. 317] Q. When did you first convey this information to anybody connected with the Government, that you testified to yesterday?

A. I think that would be about in the summer of 1941.

Q. Whom did you convey it to?

A. As I recall it, at that time they were making some investigation of the land acquisition activities of the Weldon Springs project, and Mr. Mayer, of Mr. Blanton's office, came out into our office in Kirkwood, together with a man whose name I believe was Wright, who was a special representative of the Attorney General in Washington, and they wanted some information of what data we had on land values in that area, and at that time—wanted to know what I knew about this project in general, so at that time I related to them this conversation with Mr. Bolton. Before that time, however, when I came back from St. Charles, the first day that I had met Mr. Bolton, I related the conversation to some of the men in our office that afternoon, and then again, as I recall it, the next morning particularly to our man who was doing most of our work in St. Charles County.

Q. What did you tell these men in your office the next morning, when you came back from out at St. Charles?

A. I told them I had met Mr. Bolton—D. M. Bolton, as I recall it, who was in charge of the land acquisition activities for the Weldon Springs Ordnance work, and that [fol. 318] during the course of conversation I had endeavored to recommend Banning and Hartwell to him, but he

told me that they were going to use their construction foremen and superintendents; he felt that they were qualified.

Q. He thought they were qualified? A. Yes.

Q. You testified yesterday he thought they were not qualified and didn't know anything about it.

A. No, sir; I didn't.

Q. That is not in that record? A. No, sir.

Q. You saw Bolton in that room; would you know Bolton if you saw him now?

A. I am not quite positive whether I would or not.

Q. I will ask you if this happened yesterday evening, in this court-room, just after the adjournment of this court and retirement of these Judges: You were walking down that aisle toward the door over which is the clock, and Mr. Bolton stepped out from the second seat in the back there, face to face with you, and he stuck out his hand and said, "How are you?" And you said, "I don't know you", or words to that effect. That I then said to you, "When did you ever see this man?" You said, "I will see you in the morning", and you lit out of that door and went to the elevator and went downstairs. Did that happen?

A. No, sir.

Q. What did happen?

[fol. 319] A. I was going down the aisle after court had adjourned and about two-thirds the way back, on the left-hand side a man stepped out just as I was about opposite him. There were a group of other people around and he stuck out his hand—

Q. Say the very words you said right then, because four witnesses heard you and we have got—

Mr. Blanton: We ask that Mr. O'Bryan's speech be stricken from the record.

Mr. O'Bryan: It is not a speech.

Mr. Blanton: It is conduct which is uncalled for.

Mr. O'Bryan (to the witness): Go ahead.

Judge Collet: (to the witness): Finish your answer.

Mr. Blanton: Note an exception.

The Witness: As I was opposite him, he stuck out his hand. I automatically shook hands with him. I said, "I

believe that you have the advantage of me. Your face looks familiar, but I don't recall your name."

He said, "I am the man that you said you talked to about property in St. Charles County", and he said, "I am Bolton."

He said, "Where did you see me in St. Charles?"

I said, "At the hotel."

About that time a voice boomed in my ear and said, "When did you see him?" I looked around and you were standing there, so I said, "You are going to have to cross-examine me from the witness-stand", and with that I walked out.

[fol. 320] Judge Collet: Proceed with the examination.

Mr. O'Bryan: If the Court please, that is what I am doing.

Q. Is this the man that you talked with in the hotel room in St. Charles, standing here by me?

A. He resembles him very much. He was about that height. I believe this man looks like he gained a little bit of weight, and Mr. Bolton, when I talked to him, was tanned, real sun tan; looked like he had been on a construction job.

Q. Is this the man you talked to out in St. Charles, in the hotel?

A. I couldn't absolutely identify that man as Mr. Bolton, no.

Q. You couldn't? A. No.

Mr. O'Bryan: You may inquire.

Redirect Examination.

By Mr. Blanton:

Q. When Mr. O'Bryan was standing beside you, when you told him he would have to cross-examine you from the witness-stand, what remark did Mr. O'Bryan make to you?

A. Well, preliminary to me telling him that, he said, "When did you see him?" Then I said, "You will have to cross-examine me from the witness-stand", and he said, "That is why we laid this trap for you."

Q. I will ask you about the date of this conference. You don't know just what the date was, except that you fixed it as prior to the time he opened his office?

A. Just about that time, Mr. Blanton, yes.

Mr. Blanton: That is all.

[fol. 321] Recross Examination.

By Mr. O'Bryan:

Q. Whom are you working for now?

A. I am working for the Corps of Highway Engineers.

Q. And how long since?

A. Since the 13th day of March, this year.

Mr. O'Bryan: That is all.

Mr. Blanton: May the witness be excused?

Mr. O'Bryan: Yes.

[fol. 322] George W. King, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court, please.

A. George W. King.

Q. Where do you live, Mr. King?

A. At the Westgate Hotel.

Q. Are you interested in this Golden Fried Chicken place out on Delmar? A. Yes, sir.

Q. What is the name of your restaurant?

A. Golden Fried Chicken Loaf.

Q. That is out on Delmar, near Hamilton?

A. 5867 Delmar.

Q. Did you know Mr. McDonald, who owned some property in the Weldon Springs area? A. Yes.

Q. Do you have a claim pending in one of these condemnation cases, that grew out of the acquisition of the Weldon Springs area, by the Government?

A. Yes.

Q. I wish you would state to the Court, if you will, please, what interest you have in this suit, which I believe is No. 808.

A. Well, I have a second mortgage on the land, a $1300 second mortgage on the land, and also owner of the build-

[fol. 323] ing, which has a chicken plant.

Q. Who is interested in your business with you?
A. Miss Bratten.
Q. Miss Bratten? A. Yes.
Q. I will ask you if, as a portion of your chicken business, you owned a lot of brooders and other buildings in which these chickens were raised.
A. One brooder.

Mr. O'Bryan: This happens to be my case, which is to come up later. We object to going into any relationship between the fee simple owner of this property, subject to a first and second mortgage which is held by this witness, at this time, because that is a matter of another litigation which has no bearing whatever on this condemnation proceeding in which Miss Callaway is the defendant. It is attempting to try issues in another matter which is at bar on a question other than condemnation, even.

Mr. Blanton: The purpose of the inquiry is to show the methods which were pursued by McDowell's force in order to inflate the value and increase his commission.

Mr. O'Bryan: I object to that, inflation of values, and increase the commission. It is a presumption which has been indulged in by the District Attorney all the way through, that all of this was not done for acquiring prop-[fol. 324] erty for the Government, but just so McDowell could make a nickel on the deal. I object to it for that reason, because it is not material to any issue in this case, and there is no foundation in fact for any such assumption or construction as Mr. Blanton is placing on this.

Judge Collet: It may be received for such bearing as it may have upon the course of conduct in all these cases.

Mr. Blanton: Q. When you made your deal with Mr. McDonald to move this property on to his premises, had you had your brooders, and so forth, erected on other real estate, before you moved on to the McDonald property?

Mr. O'Bryan: That is objected to, because that is trying the other case. That has to be a subsequent trial, whenever the money comes in here, whether it comes through this contract, or by condemnation proceedings, and has no part or parcel in this case, because he is not the title owner in any shape, form or fashion.

Judge Collet: We will determine that when we hear what the evidence is. Overruled.

By Mr. Blanton:

Q. What did this property consist of, that was moved from these other premises on to the McDonald property?

A. A large broiler plant—

Q. I didn't catch that.

A. A large broiler plant, a portable building put up in [fol. 325] ten foot sections.

Q. What was the size of this broiler plant, as you call it?

A. It was twenty by thirty-five—twenty feet wide, thirty feet high, and one hundred feet long at that time.

Q. Is that also known as a brooder plant? A. Yes.

Q. Did you folks hatch these chickens, or did you buy the chickens and then raise them in your brooder?

A. We had them hatched and raised them.

Q. What other property was moved on to the McDonald premises by yourself and by Miss Bratten?

A. That was all; just the building and the equipment inside.

Q. And the equipment inside? A. Yes.

Q. Was that property of a nature that could be dismantled and moved off? A. It was.

Q. What value did you place on that equipment?

A. Well, the building cost about eight thousand dollars when we built it first. Then we moved it on to McDonald's property.

Q. What did the equipment inside cost?

A. Well, there is so much I don't remember just what it totalled up to be, but—

Q. Well, approximately.

A. I should say about three thousand dollars.

[fol. 326] Q. Could that brooder house, or broiler house, as you call it, and the equipment inside, be moved off of those premises without serious damage to the property itself?

A. Oh, yes.

Q. It could be moved off in the same condition it had been moved on? A. That is right.

Q. I will ask you if you had any conversation with either R. N. McDowell, or any member of his organization, when

he was negotiating for the purchase of this McDonald tract which is involved in this other case.

A. I did.

Q. With whom did you have your conversation?

A. Mr. Baker.

Q. Was he a member of Mr. McDowell's organization?

A. He was.

Q. Where was that conversation held?

A. In the office in St. Charles, Mr. McDowell's office in St. Charles.

Q. I wish you would state what that conversation was, please.

A. I had never met Mr. Baker, but he sent me a notice to be in his office, to meet him and Mr. McDowell at ten o'clock on Saturday morning, and he wanted me to sign an option for my building and equipment. The chickens—there was twenty thousand chickens there at the time—no; [fol. 327] the capacity was twenty thousand. There was, I think, six thousand at the time.

Q. You may state what further was said and done about that.

A. So, he told me I couldn't move the building or move any part of it, or take anything out of the building. All I could do would be take the equipment out that was not attached or fastened to the building.

Q. Did you ask leave to move the building?

A. I did.

Q. What did he say when you asked leave to move this building which you had moved on to the premises?

A. That I couldn't touch anything; that I could only take my equipment out of the inside.

Q. That is the building you say cost you eight thousand dollars? A. Yes.

Q. Which had been moved on to this identical land?

A. Yes, sir.

Q. You didn't own the real estate? A. No.

Q. The only interest you had in it was that you had loaned McDonald money?

A. Yes; second mortgage.

Q. Did you ever get to move your property?

A. No, sir.

Q. After he sent for you this one time did you have any further conference with him about signing an option?

A. At that time I asked him about the chickens. He [fol. 328] said, "What is the chickens worth?"

I said, "We pay ten cents apiece for them when they are hatched and they are rated all the way from ten to fifty cents apiece."

So, he said, "The Government will pay for the chickens," but we was not to put any more in.

Q. There was not anything attached to the ground about the chickens, was there, that would have kept you from moving the chickens?

A. No, but there was the—

Q. Did you eventually sign an option?

A. No, sir.

Q. When you went back and found out what was happening to your buildings what information were you given, and by whom?

A. What was happening to it? I went back about a week later and I didn't get hold of Mr. Baker then. He was not there. So I went back a couple of days later and he told me that Mr. McDonald and Mrs. McDonald said they owned the building and had signed an option.

Q. And you didn't sign any option? A. No, sir.

Q. Were not offered an option? A. No, sir.

Q. But were told by Baker that the McDonalds signed it, and you were not consulted about the amount put in the option?

A. Mr. Baker told me I had nothing more to do with it, they owned the building and all the improvements on the farm, and the farm also; there was nothing I could do about it.

[fol. 329] Q. Did you move your chickens?

A. Yes, I moved them.

Q. And you moved the equipment inside the building?

A. Yes.

Q. And later built a building of your own—

A. I leased another place and fixed it up, moved the equipment.

Mr. Blanton: Take the witness.

Cross Examination

By Mr. O'Bryan:

Q. Mr. King, you had a second mortgage on this property?

A. Yes, sir.

Q. You raised chickens out there, and you had the Golden Fried—how do you call it?

A. Golden Fried Chicken Loaf.

Q. On Delmar. You have a big sign. You have been there for several years? A. Yes.

Q. You had an arrangement whereby they would produce the chickens and bring them in to you and you would sell them? A. That is right.

Q. You never had any interest in this real estate and the title to it, other than the second mortgage?

A. Second mortgage.

Q. After the chicken house was moved from your place we had a cyclone, in '37? A. Yes.

[fol. 330] Q. That blowed the whole thing away?

A. No, it didn't blow the whole thing away.

Q. That just damaged it and tore it all to pieces, and killed several thousand chickens? A. Yes.

Q. That set you back in your business out there?

A. Yes.

Q. And this boy borrowed some money and reconstructed and fixed it up?

A. I let him have the money to rebuild it. I furnished the money to rebuild.

Q. You took a second deed of trust for that money?

A. Yes, sir.

Q. That is what that second deed of trust is for?

A. Yes.

Q. Those buildings all have been demolished; have you been out since— A. No.

Q. You don't know whether the building has been burned down or demolished, or not? A. No.

Mr. O'Bryan: That is all.

Redirect Examination

By Mr. Blanton:

Q. Was it such a building as could have been removed without damage to the building or to the real estate?

A. That is right.

Mr. O'Bryan: That is objected to * * .

Judge Collet: Any further questions?

[fol. 331] Mr. Blanton: That is all, Your Honor.

Judge Collet: That is all.

MINA F. BRATTEN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination

By Mr. Blanton:

Q. Miss Bratten, state your name to the Court, please.

A. Mina F. Bratten.

Q. Where do you live? A. 7020 Arcade.

Q. Are you jointly interested in this Golden Fried Chicken restaurant on Delmar, in which Mr. King is interested? A. Yes.

Q. I wish you would state what you know about this situation out there on the McDonald tract, in the Weldon Springs area, please.

A. Well, I was in California at the time that this all occurred. I came back just at the beginning of it, and Mr. King told me, "I have bad news"—

Q. I don't ask you to repeat what Mr. King told you. Tell us what happened after he gave you certain information.

A. He told me there was going to be a plant put up at [fol. 332] Weldon Springs and they wanted the property, our building. I said—

Mr. O'Bryan: I object to all this testimony as to what Mr. King said.

Judge Collet: Same ruling.

Mr. Blanton: (to the witness) Go ahead.

A. And I asked him what he had learned about it and he told me as much as he could, that as far as he knows, he doesn't know whether he is coming or going on it.

I said, "What about these chickens?" "We have to keep the chickens in there; we can't turn them out." It is a

very peculiar business. We have to have these birds. Naturally, a week or two week's loss, without being able to put birds in, would throw me on the open market. I said, "How about getting back the building and getting a piece of ground?"

We went there to contact them different times and they told us—

Q. Whom did you contact when you went out, and you went out where? A. To St. Charles.
Q. And whom did you contact when you got out there?
A. We tried to see Mr. McDowell.
Q. Were you successful? A. No.
Q. Did you go to McDowell's office?
A. Yes. There was a lady at the office, at a desk.
[fol. 333] Q. What did she tell you?
A. There would be a representative in each section that would take care of our personal interest in the matter. Each one—they had the thing sectioned out. They had a map there showing that different men had certain sections, and Mr. Baker was the representative—
Q. Did you later see Mr. Baker? A. Yes.
Q. Where, and about when?
A. I saw Mr. Baker twice. One time he was pointed out to me at the mass meeting where Senator Williams was speaking, but I didn't speak to him. The next time I spoke to him was in St. Charles, in the office. I asked him, "What about my building? Can I move it; what can I do?" And he said, "No, there is nothing you can do." I said—

Mr. O'Bryan: I want to object to this evidence and move that it be stricken out. This Court is well versed in the law with reference to buildings attached to real estate and being part of real estate, and other claimants claiming interest in real estate when one of them only has a mortgage.

I move that all of this be stricken out, for the reason that it can not be pertinent to the issues in this case in any way.

Judge Collet: Motion denied.

[fol. 334] By Mr. Blanton:

Q. The Court says you may proceed, Miss Bratten. You were talking about this conversation you had with Baker, in McDowell's office in St. Charles.

A. I couldn't get head or tail from the man, to be truthful.

Q. Did you ask permission to move the building?

A. I did ask permission to move the building. He said, "No; no, you can't move it."

I said, "Why?"

He said, "I don't know," and that is as far as I got.

Q. Did he tell you why you couldn't move it?

A. No.

Q. Did he tell you who had instructed him you couldn't move it?

A. The Government. I said, "Who is the Government?"

He said, "You have to do business with me", and I didn't know one thing from another. That is the truth.

Q. What kind of a building was this that you were interested in out there?

A. It is a broiler plant. We raised battery raised birds. They are all raised upon a system of wires, and they call that a broiler plant. The birds don't run on the ground. It is a building to house the birds and they are raised in a scientific method. They don't attain muscle. You have to have a building that is properly heated, have scientifically controlled feed, and also the proper temperature.

[fol. 335] Q. Had this building been moved on to this McDonald property from some other premises?

A. Yes, it was; 3512 Brown Road. McDonald sold us birds at that time, and that was our first contact with Mr. McDonald.

Q. Miss Bratten, was this building constructed in sections, so that it could be removed from the first premises on to the McDonald property?

A. It was due to the fact that it was put up in sections. I believe the real estate law, I may be wrong—

Q. I just asked if it was constructed in sections.

A. Yes, it was, and it was on leased ground at that time.

Q. I will ask you if it was moved in the same shape and re-erected on the McDonald property.

A. That is right.

Q. Can you tell us what that cost you and Mr. King?

Mr. O'Bryan: We object to any cost, or what they spent. Mr. King has already testified he took a deed of trust, and what he put into this thing—

Mr. Blanton: He didn't testify to anything of the kind.

Mr. O'Bryan: I wish you were King's lawyer. We will try that case before the jury, later on.

Mr. Blanton: He has a very good lawyer, Mr. O'Bryan, and is entirely satisfied with him.

Judge Collet: Overruled.

[fol. 336] A. I forget the question.

(Last previous question read to the witness as follows:

"Q. Can you tell us what that cost you and Mr. King?")

A. Yes; the building cost eight thousand dollars to erect.

Mr. Blanton:

Q. What did it cost you to remove it when you moved it from the first premises on Brown Avenue to the McDonald tract?

A. Mr. McDonald paid the removing expenses, with the understanding that he was to have full use of the building and equipment and produce birds for us.

Q. What was the understanding about who the building was to belong to after your arrangement with him was over?

A. It is my building; mine and Mr. King's. He was a tenant.

Mr. Blanton: Take the witness.

Cross-Examination.

By Mr. O'Bryan:

Q. Miss Bratton, you had a draft down there, the cold breeze blowed in and that gave the chickens a cold?

A. That is right.

Q. And some of them died?

A. That is right.

Q. You all had been buying chickens from the Brown boy in St. Charles, or the McDonald boy in St. Charles County?

A. Yes.

[fol. 337] Q. Mr. King made him a propostion to move this building out there?

A. That is right.

Q. McDonald came in and moved the building and paid for the moving and everything and set it up on that farm?

A. That was his agreement.

Q. A cyclone came along in 1937 and blowed it down and tore it all to pieces?

A. Not all to pieces.

Q. Twisted those pipes and wires?

A. And it cost me eleven hundred dollars to rebuild.

Q. Blowed out sections of it and they had to go in and reconstruct it, didn't they, and lost several thousand chickens, and you were buying and paying him for all the chickens he raised?

A. That is right.

Q. You paid him when he brought the chickens in?

A. That is right.

Q. That was six thousand chickens that he lost in the cyclone?

A. The chickens were his loss; the building was our loss.

Q. He borrowed twelve hundred dollars from Mr. King and gave a second deed of trust to repair the building and pipes?

A. Not to repair it. What he—

Q. You didn't put up any money to repair it after the cyclone?

A. Yes, eleven hundred dollars. I rebuilt it. McDonald didn't have a dime.

Q. And he gave you a deed of trust?

A. He did not. That is my money. The deed of trust [fol. 338] has nothing to do with it at all. The deed of trust was way in the beginning. The cyclone was a year and a half or two years later.

Mr. Blanton: I think that is all, Miss Bratton. Thank you.

(United States Exhibits.)

Exhibit 5.

Mr. Blanton: Your Honor, at this time I would like to offer in evidence some exhibits that have not heretofore been offered.

I would like to offer Government's Exhibit M-5.

(To Mr. Watson) This is the original contract with McDowell that I am going to now offer, Sam.

I now desire to offer in evidence Government's Exhibit M-5, which is the contract that Colonel Valliant gave to McDowell, setting forth the terms and conditions under which he was to acquire this property out here.

Is there any objection?

Mr. Watson: No objection.

Judge Collet: Are you going to read that?

Mr. Blanton: Yes, I will read it, so it will be in the minds of the Court. I think it is pertinent.

(Reading): "October 23rd 1940

Attention: Col. R. D. Valliant, Q. M. C.
Chief Real Estate Branch
Office Quartermaster General
War Department
Washington, D. C.

[fol. 339] Dear Sir:

R. Newton McDowell, hereinafter in this letter called the 'Optioner', makes the following proposal, which, when accepted by the United States of America, hereinafter called the 'Government', shall constitute a binding agreement:

1. R. N. McDowell will undertake with diligence and promptness to use his best efforts in the acquisition by the Government of approximately 18,000 acres of land, more or less, located in St. Charles County, Missouri, in the vicinity of Weldon Springs as more specifically to be designated by the Government.

2. The Optioner, immediately upon acceptance of this proposal will with adequate and competent force of experienced men exhaust every reasonable effort to acquire within forty-five days of the effective date of this agreement, options for the purchase of said land to be taken in the name of the United States of America. At the expiration of such forty-five day period, the Government shall have the right, upon written notice, to require the Optioner to continue his efforts for a further period to obtain options; but at no time shall the termination of the Optioner's efforts to obtain options release him from performing all duties hereafter imposed upon him in connection with options then taken, and then or thereafter accepted.

3. The Optioner shall diligently endeavor to acquire such options, not only within such time, but at the reasonable value of the land to be acquired, and subject at all time to the directions of the Government. The form of option contracted to be executed, and all terms, convenants and conditions thereof, shall be on the form approved by the Government, and a copy of which is to be attached hereto and made a part hereof. It is understood that the Government is to have the exclusive right to take up or reject any option to any parcel of land optioned by said Optioner hereunder, except as hereinafter provided.

[fol. 340] 4. The Optioner will at his expense procure the services of the Kansas City Title and Insurance Company to attend to all administrative details of the closing of purchases under the options and the acquirement of deeds. The Optioner shall procure from the vendors in all cases where options are accepted on behalf of the United States, an order to the Kansas City Title and Insurance Company, to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination. The certificates of title, to be furnished by The Kansas City Title and Insurance Company will be on forms similar to the one attached hereto and made a part hereof and funds to effect closing of purchases by the Title Company will be furnished by the Government to the Title Company in form of checks payable to each vendor in the amount of the purchase price set forth in the accepted options.

5. Duly authorized agents of the Government shall have the right at any and all reasonable times and hours to inspect and take copies of all records and memoranda of the Optioner, his agents and attorneys evidencing his transactions herein contemplated.

6. This agreement shall not be assigned by the Optioner, in whole or in part, nor shall he part with any interest herein, it being expressly understood and agreed that the expansion of personnel, or the payment of expenses, for the purposes herein contemplated shall in no event be construed a violation of this provision.

7. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

8. For all services hereunder the compensation of the Optioner shall consist solely of the five per cent (5%) commission in each purchase, to be paid by the vendor, as more specifically set forth in the form of option attached hereto and made a part hereof.

[fol. 341] If the foregoing proposal is acceptable to the Government, please so indicate by signing and returning to me one of the enclosed carbon copies hereof.

Very truly yours,

(Signed) R. NEWTON McDOWELL,
(Signed R. Newton McDowell,

The Foregoing proposal is hereby accepted for and on behalf of the United States of America, this 23rd day of October, 1940.

(Signed) R. D. VALLIANT,
R. D. Valliant
Colonel, Q. M. C.
U. S. Army."

(Government Exhibit G-9)

Now I would like to offer Government's Exhibit G-9. That is the declaration of the Under Secretary of War Patterson's declaration of the policy to be pursued in the acquisition of this property.

(To Mr. Watson) I think you have seen it.

Mr. Watson: No objection.

Mr. Blanton (reading Government's Exhibit G-9):

"War Department
Office of the Assistant Secretary
Washington, D. C.

November 5, 1940.

Memorandum for the Quartermaster General
Chief of Ordnance
Chief of the Air Corps
Chief, Chemical Warfare Service

Subject: Acquisition of Land in Connection with Munitions Plants.

[fol. 342] 1. The policy of the War Department in connection with land acquisition for munitions plants is to secure the good will of the community to the maximum extent possible, consistent with fair prices and the availability of the land at the time and in the location needed.

2. In carrying out this policy, it is desired wherever possible to cause the least hardship and inconvenience in moving the tenants off the site. In existing and future projects, it is desired a plan for each project be worked out by The Quartermaster General and the interested Supply Branch. This plan should, in so far as practicable, delay the moving of tenants when such delay is desired by the tenants. For example, in explosive plants, where there are tenants living in the safety area surrounding the actual operating and storage area, it might be practicable to delay moving such tenants until the plant is nearing completion.

3. Also, in carrying out the above mentioned policy, wherever the land is being acquired by a contractor, The Quartermaster General should have a representative in the

vicinity whenever possible. Such a representative in addition to indicating an active interest in the welfare of the tenants by the War Department could materially assist the contractor in authorizing minor changes when such changes would be to the best interests of both the War Department and the landowners or tenants.

(Signed) ROBERT P. PATTERSON
Robert P. Patterson,
The Assistant Secretary of War."

(Government Exhibit G-11)

I next want to offer and read a portion of Government's Exhibit G-11, which was identified by Mr. Langenbacher and by Mr. Sinock yesterday. It is rather long, and I shall not read all of it. I am offering the entire document, but will read just a portion.

It is dated Howell, Missouri, November 9, 1940, and reads:

[fol. 343] "Dear Friends:

This letter to all of the farm owners, farm tenants and business men within the Weldon Springs T. N. T. Plant Area has been prepared in consultation with the members of the Committees announced in a letter dated October 26, 1940 from Mrs. Clinton, Home Demonstration Agent and Mr. Langenbacher, County Extension Agent.

It will be recalled that the letter sent on October 26, 1940, to all of you announced that a local committee had been selected to assist and advise you in the taking over of the land for the T. N. T. Plant Area. This letter also announced that the State Land Use Planning Committee would be asked to cooperate in a survey to determine the character of the assistance that might be needed by farm owners and farm tenants in getting located elsewhere.

The two Committees represented by Mr. E. M. Miller, Mr. Claude Muschary, Mr. Geo. H. Hackmann, Mr. L. E. Wackher and Mr. R. H. Sinock for the community and Mr. J. D. Monin, Jr., Mr. Ross Silket, Mr. J. W. Burch, Mr. S. H. Hughes, Mr. D. C. Wood, and associates of the State

Land Use Planning Committee at Columbia met together in St. Charles on Monday Afternoon, November 4, Tuesday the 5th, and again in Howell on Wednesday the 6th including conferences with Mr. R. N. McDowell purchasing agent for the War Department.

It was the purpose of the public meeting on Wednesday night in the High School at Howell to give a report of the work of these two Committees and to give the farm owners and farm tenants an opportunity to ask questions. The committee invited Mr. McDowell to be present at this public meeting in order that he might answer questions on behalf of the War Department that might be asked by the farmers.

Those of you who were present at the meeting know that so much time was taken up in discussion by others who were not connected with the Committees that there was insufficient time for the farmers to present their problems. Because of this the undersigned farmers who have had the opportunity to talk directly with the members of the two Committees feel that in justice to our Government and our community that we should make the following statement:

1. We believe that the Government, through Mr. McDowell, the purchasing agent for the War Department, will pay a fair and just price to the farm owners and to the farm tenants;

[fol. 344] 2. We understand that a fair and just price includes the fair, current, market value of the land and the improvements and a just additional amount to pay for some of the extra costs and losses due to leaving your home on short notice perhaps before opportunity to locate elsewhere. This extra amount will also include a fair and just sum to pay for the rights of the tenant. Thus the amount stated in the option will be the gross sum for the sale of your farm. This sum will include the net amount you will receive, less any encumbrances; the amount to satisfy the rights of a tenant; the legal costs and the commission to the War Department's Agent;

3. The Committees have given Mr. McDowell their suggestions on the items that they think should be considered

in determining the payment to the farm owners and to the farm tenants. Mr. McDowell, subject to the War Department's instructions, has promised to give all possible considerations to these suggestions. For example, it has been suggested that a fair and just payment for the land sown to wheat would be to pay for the number of bushels (this was within less than a month after the wheat was sown) that would be paid for under Government crop insurance and at the current price for wheat;

4. We therefore believe that it is in the best interest of our Government, our community and the farmers themselves to negotiate directly with the War Department's purchasing agent at fair and just prices without unnecessary delay. We feel that if there is unusual delay the Government despite what was said at the meeting at Howell will undertake condemantion proceedings. Under condemnation proceedings the Court no doubt will award a fair price. In a legal settlement for land, however, that price may not include items for costs and losses incident to relocation;"

I have no objection to opposing counsel reading the rest, if they want to, but I don't think it is pertinent to the matter involved here.

Government's Exhibit G-11, in its entirety, is in words and figures as follows, to-wit:

This exhibit is on file in the office of the Clerk of the Circuit Court of Appeals.

[fol. 345] (Government Exhibit G-12.)

Mr. Blanton: I next want to offer Government's exhibit which has been identified as G-12, which is an exemplified copy of a letter written by Mr. McDowell, under date of January 8, 1941, to Arthur C. Ringland, Consultant Agricultural Division, Advisory Commission to the Council of National Defense.

Mr. Gentry: Written to Mr. who?

Mr. Blanton: Arthur C. Ringland.

Mr. Coburn: What is the date?

Mr. Blanton: January 8th, 1941.

Mr. Watson: It has not yet been offered?

Mr. Blanton: I am now offering it.

Mr. Watson: I don't know what it is.

Mr. Blanton: Excuse me. I thought you had seen it, Sam (handing exhibit to Mr. Watson).

Government's Exhibit G-12 is a certified copy of a letter appearing in the files of the Department of Agriculture.

"R. Newton McDowell
Home Office
Midland Building
Kansas City, Missouri.

Land Optioner for United States
War Department

Telephone 1091
126 South Main
St. Charles, Missouri.

January 8, 1941

Mr. Arthur C. Ringland, Consultant
Agricultural Division
[fol. 346] Advisory Commission to the Council of National Defense
Federal Reserve Building,
Washington, D. C.

Dear Mr. Ringland:

In reply to your letter of January 2 I note Mr. Turton's request as to the principles governing the proper compensation for 'disturbance damages' to the farmers and tenants.

This is a large subject and I could discuss it for hours but suffice it to say I did work out a long list, spending hours on it, setting up specific amounts for this and that which I believed entirely fair and due the farmers because the Government was demanding their land whether they liked it or not and was requiring them to get out pronto. However, (and this was the weakness) I based this compensation on the theory that the valuation of the land would

be based on the real agricultural value. Therefore, if you start at that figure then it is very proper to add on the items you refer to as 'disturbance charges' but in actual practice I found the very first day that the minute the farmer is advised that the Government is in a hurry to buy his farm his very lowest talking price is far above any 'agricultural value.' You are then precluded from adding these 'disturbance' items so in disgust I threw my carefully prepared list out the window.

I have been dealing with farmers for years and my experience has proved to me that the average farmer can give the 'city slicker' cards and spades and skin him alive.

I am really a very mild mannered individual but in St. Charles County they gained the impression that I was quite a hardboiled person as I rejected options on thousands of acres as too high and sent my men back time after time (this is McDowell's statement; I am not describing it as being a fact) because the options were out of line in my judgment of a fair price and without exception they would ultimately come down to my figure. Do not misunderstand me, I am not calloused, but I did not lose any sleep over the farmer's compensation because he received a good deal from the Government. However, I have been reported to the White House, senators and congressmen, the Secretary of War and Lord knows to whom else but fortunately I am not a political contractor and I stuck to my guns for if you did not keep a firm hand the prices would get out of control. Now that it is all over I think these farmers are my friends [fol. 347] and I have helped them to get money from banks to make down payments on farms. We have aided tenants in a dozen different ways and while my contract does not require this I am keeping four men in my St. Charles office merely to be of service and they have done nothing for the past month but aid the farmers in any way that they are able so they do not think we are such a bad lot after all.

I did see to it that all of the tenants received something and all the farmers and tenants who wished it were given first chance at the jobs on the work. This is most important and in this we had excellent cooperation from the Fraser-Brace Engineering Company, the contractors, and

from Captain Dutton, the Ordnance officer in charge. I must admit my method of settling with the tenants was not very scientific as I based it largely on how many children they had. Further, the work of the twelve agricultural agents was most helpful and was greatly appreciated by the farmers and tenants as it gave them a feeling that their Government was really concerned in 'where they landed.'

I was visiting today with Major Nielson, District Engineer here, and his assistant, Major Johnson. They used a few men they had available from their land department to acquire"—

Then he talks about some properties and compares it with other projects that he had acquired.

"I have rambled all over the place"--

Mr. Watson: Read the whole thing.

Mr. Blanton: I have no objection to your reading it. I don't think it is pertinent.

"I have rambled all over the place and really have not told you much but if you are still interested I can again work up the figures I had covering 'disturbance valuation.'

Yours very truly,

(S) R. NEWTON McDOWELL.

[fol. 348] RNMcD:dm

P. S. Major Neilson calls his appraisals 'immediate possession values.' I told the farmers each time I approved an option that the Government was overpaying him but I was allowing him the increased price because the Government was quickly dispossessing him and because he had losses on his livestock and crops in the field, he had silage which could not be removed, he had expenses in relocating, etc., etc. We made this little speech for the reason that at one time I felt that we were going to have to condemn a large number of tracts as a considerable group of farmers organized themselves and swore by all that is holy that they would not take less than $200 per acre for their farms. My thought was this: If I condemn these farms I will make a declared value of $75 and they can not use the next door neighbor's price of $125 as an argument

before the court at a later date. However, I am only going to have to condemn one tract and that belongs to the son of one of the richest men in St. Louis."

Mr. Watson: You won't object to my reading that?

(Here ensued private colloquy betwen Mr. Watson and Mr. Blanton.)

Mr. Watson (reading):

"I was visiting today with Major Neilson, District Engineer here, and his assistant, Major Johnson. They used a few men they had available from their land department to acquire 2700 acres for a small arms plant located at Lake City near Kansas City. They told me they had two agricultural appraisers from the Soil Conservation Bureau and they would accept 'offers' from the farmers and in no case did they take an option which exceeded 7% of the appraisal made by the agricultural men. They told me their average price was $180 per acre which did not include any schools, towns, etc. This land is not much better than the Weldon Springs land and this tract is twenty miles from Kansas City whereas the Weldon Springs tract is only twelve miles from St. Louis. Our average price per acre for farms was around $125 and our overall cost for the entire site which included $100,000 of schools, the entire town of Hamburg and the town of Howell and the small village of Toonerville was $159 per acre so it would appear that [fol. 349] the agricultural appraisers were a little more generous than I.

I was talking in Washington the other day with Mr. Harrison, Chief Engineer of the United States Bureau of Public Roads. He told me of a rather interesting survey which had been made covering the cost of rights of way, both railroads and highways, and this survey covered most of the United States. The findings showed that if a right of way cost 1.6 times the actual farm value (minus improvements) it was a reasonable deal. He compared acquiring land quickly for munitions plants to that of quickly acquiring rights of way. I had figured the average farm at Weldon Springs (minus Government) wherein you could

shop around and take your time in buying would have a value of about $75 per acre so my purchases checked out by Mr. Harrison's yardstick excepting my prices included the improvements—and we had a number of farms which carried a substantial speculative value because of increased building in that area by St. Louis people."

Did you read this, Harry (indicating on exhibit)?

Mr. Blanton: Yes, I read that.

(Government Exhibit G-1)

Now, Your Honor, I would like to offer in evidence Government's Exhibit G-1, which is a letter from R. Newton McDowell, dated March 22, 1941, to Mr. John J. O'Brien, who, I may say, succeeded Colonel Valliant.

(Reading Government's Exhibit G-1):

"R. Newton McDowell
Home Office
Midland Building
Kansas City, Missouri.

March 22, 1941.

Mr. John J. O'Brien
Chief of Real Estate Section
Quartermaster Corps, War Dept.
Railroad Retirement Building
Washington, D. C.

[fol. 350] Dear Mr. O'Brien:

I am enclosing mimeographed communications I have mailed to all the unpaid landowners in the Weldon Spring Ordnance Area.

This wire refers to 'widespread criticism of War Department.' This criticism originated from Senator Bennett Clark who was fed information from two men who, to say the least, are mentally confused. I would gladly give you their names but I do not wish to hurt their families who are fully aware of these communications to Senator Clark. Later on I am going to have a great deal to say on this score. Perhaps Clark's criticism was sour grapes

as his own statement suggests, 'Why did they pick a Kansas City man when there were plenty available in St. Louis?'

The wire mentions lack of appraisals. (Which is one of the allegations in our petition, that Valliant didn't have any appraisals and relied solely on the recommendation of McDowell) To have stopped and had detailed appraisals made of 300 tracts and buildings would have required so much time the war would have been over before they were finished. Further, I thought that was my job—that was why I was hired. I made a most thorough and detailed investigation of values in that area and my whole organization has had wide experience with farms and farmers, most of them own farms themselves, and I myself own four farms. It so happens in the last fifteen years we have done a lot of work in St. Charles County, in fact at one time we operated a quarry in St. Charles County. All of my men are on an annual salary and most of them have been with me for fifteen years or longer. I had one man on a weekly salary on leave from the Federal Land Bank and one on leave from the Agricultural Conservation Association who had accumulated a number of farms for the Department of Agriculture."

Now I am going to skip a paragraph, which I am not going to read—

Mr. O'Bryan: I suggest that you read that.

Mr. Blanton: I want to read the part that I want to call to the Court's attention. I want to next read the para-[fol. 351] graph headed "Excessive Prices".

"You do not know whether my prices are excessive or not because you have not been furnished with any intelligent information on the subject. Let me remind you the exact sum total of your information on values and how it was secured. Ewing Wright, political lawyer from southern Indiana, who has some connection, I don't know what, with the Department of Justice walked on this project and in the first five minutes stated these prices are too high and started preaching condemnation proceedings and he did not know a damned thing about it. My man Bolton told him that condemnation proceedings would cause a riot and

we had been instructed not to condemn but to negotiate fair prices and to allow something for the tenants, cost of moving, cost of crops and take into account disturbance value and that we had written instructions from Secretary of War Stimson and Under Secretary Patterson laying down the method of our procedure and among other things 'to maintain maximum goodwill in the area.' Mr. Wright's philosophy was to condemn the farms and as he put it, make them like it, for the Government takes men and puts them in the Army and makes them like it. That may be the correct policy, I have my own views on that, but that decidedly was not the policy under which we were instructed to acquire this land."

Then he has a lot of other self-serving statements in there which we don't think are pertinent.

Mr. Coburn: What is the date of that letter?

Mr. Blanton: March 22, 1941, is the date of the letter read.

Mr. Watson: If the Court please, in view of the fact that part of the letter is read, I would like to have the privilege of reading the rest of it.

Judge Collet: All right. Before you read that, let us take a ten-minute recess.

[fol. 352] (At this point a brief recess was had, after which the hearing was resumed.)

Mr. Watson: I now read the portion of this exhibit that has not been read. If I am found to be re-reading part of it, I would like to be checked on that.

Judge Collet: That is Exhibit 13?

Mr. Watson: G 1. (Reading)

"On some of the buildings in the two small towns we acquired I used the chief appraiser for HOLC in St. Louis. In the case of orchards, about which we knew nothing, we called the Stark Nurseries of Louisiana, Missouri, one of the outstanding authorities of the country. In regard to the bluff land overlooking the Missouri River of which there is about 1,000 acres within the site area, I personally, spent four days checking prices on bluff lands from a point

far south of St. Louis on the Mississippi River up to Alton, Illinois, and around on the Missouri River. I could write a small-sized book on this subject. I was amazed to find bluff land overlooking the rivers actually selling for $1,000 per acre. I paid $200 per acre for all bluff land accepting one parcel and if you take this bluff land to condemnation I would say it is a cinch bet that these owners could parade dozens and dozens of expert witnesses which would cause any jury to allow upward of $500 per acre for this land. Only in one case I allowed $300 per acre and that was to George Willson one of the outstanding lawyers of St. Louis who had built a country home there.

The rough wooded land in this area commands the highest prices from St. Louisians who have just begun to build in that area. You must remember since the completion of the new Daniel Boone Bridge across the Missouri River right at this T. N. T. site, it has placed this property forty-five minutes from St. Louis on a super-highway.

My men would argue about prices and take options at the lowest possible figure. Each night I would go over each [fol. 353] option with the men and I rejected thousands of acres and had the men go back again and again. Many of these options I would reject three or four times and frequently switched men until an option was brought in at a figure I could conscientiously recommend to the War Department. If necessary, in the last analysis, I would call on the party myself. I was the most despised man in St. Charles County and was put down as an extremely hard-boiled individual.

I understand some agents in other parts of the country who handled similar contracts to mine merely went out and hired brokers who paid their own expenses and worked on a commission and more or less lined up the farmers and signed at any figure—My God, we worked like Trojans."

I will omit the paragraph which Mr. Blanton read.

"Wright then picked up three appraisers who were about as qualified to do the job as I am to judge guinea pigs. He then chose ten tracts, nine of which were the most expensive parcels in the area, and these three alleged appraisers, one a filling station operator in St. Charles, an-

other a farm machinery salesman from Old Orchard, Missouri, and the other a farmer from Matson, Missouri, and they prepared the figures that were handed to you after requiring fourteen days to appraise these ten tracts and in some cases they had to use their imaginations as some of the buildings had been demolished. Therefore, on this report, which is entirely valueless, you announce to the world that I allowed excessive values.

Wright said he would not admit the property had any suburban value although it is forty-five minutes from St. Louis and I can show you where St. Louis people have paid from $250 to $350 for land in that site area which agriculturally speaking is not worth $75.

The Missouri State Highway Department, a few years ago when they were acquiring a 200' right-of-way for Route 61 which is now the eastern boundary of the T. N. T. site, paid an average price of $112 for sixteen parcels of land and went to condemnation on five parcels and took a terrific licking. Witnesses were brought before the jury to show that land similarly located near St. Louis had a value of $250 to $350 per acre and the courts allowed under con- [fol. 354] demnation proceedings an average price for these five parcels of $177 per acre and the balance of these farms (these 21 tracts) are now owned by the Government. Our average price on agricultural land including total cost to the Government average $114 per acre and our over-all price for the entire site including all costs to the Government, including business houses, homes, churches in two small towns and one small settlement and $100,000 paid for schools, was $159 per acre. Therefore you can sit in Washington and decide that $114 per acre including all costs to the Government for any old farm land located forty-five minutes from St. Louis on a super-highway and know that the Government could not have been stung very much. Therefore, I make the statement that you are acting on rank misinformation and I firmly believe that under condemnation proceedings the Government would get stung one million dollars more than my option prices. Of course there are some poor farmers who are in a pitiful financial condition as a result of this long delay who could be browbeaten under the threat of a long drawn out legal battle into accepting almost any sum in cash.

However, all of the above at this stage is totally unimportant for the all important question is this: Is the United States Government going to stand on a policy of repudiating its written obligations with its own citizens? That policy is far-reaching and transcends everything else.

All of these transactions did not come to light within the last few days or weeks. The Department of Justice knew all about my contract and what was going on in Weldon Springs as last October I requested that the Department of Justice send out a man to be kept on the job for the entire period of acquisition and I got out a letter to the farmers advising them of this. In November the Department of Justice did send out one of its men from Washington"—

Judge Collet: November of what year?

Mr. Watson: It doesn't state what year.

Mr. Blanton: It was in 1940, Your Honor.

Mr. Watson (reading):

"In November the Department of Justice did send out [fol. 355] one of its men from Washington who stayed in St. Charles about two weeks and aided in closing the first options. He then said we knew all about it and there was no use of his remaining any longer.

I understand you agreed to pay the farmers in full on the seventy tracts of land at Burlington, Iowa, which had been officially accepted by the War Department which I think you should have done. I understand there are about $3,000,000 of officially accepted options at Wilmington, Illinois, and that you have held up payment on this project. According to the testimony you gave before the Military Affairs Committee as quoted in the Chicago Tribune you state that these values are excessive. Are you proposing to heap more criticism on the War Department by repudiating these contracts in Illinois by announcing condemnation proceedings? I hope not.

Mr. O'Brien, you have been dumped into a hot spot—I perhaps do not have to tell you of that—I think you have been fed with a lot of misinformation and bum advice and if you had the time, which you have not, to go into these

things yourself in detail you would find that I am correct. Anyone can be stubborn but it takes a good sized individual to reverse himself. I definitely feel that the right and proper thing for you to do in all fairness to these farmers, a great many of whom are in a tragic condition, would be to withdraw your recommendation that the Government repudiate its obligations and pay in full all officially signed agreements, whether at Burlington, Wilmington or Weldon Springs, and reserve for yourself the right to run the Department from now on out under any policy you choose.

Yours very truly,

(Signed) R. NEWTON McDOWELL."

Mr. Blanton: Your Honor, may I interrupt the order of proof; may I offer a little proof out of order?

Judge Collet: Very well.

[fol. 356] Birch O. Mahaffey, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the Government, in rebuttal, as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Mahaffey, state your name to the Court, please.

A. Birch O. Mahaffey.

Q. Where do you reside?

A. No. 9 Portland Place, in the city here.

Q. Mr. Mahaffey, I believe you did own considerable acreage out in the Weldon Springs area? A. Yes, I did.

Q. Consisting of five or six separate parcels?

A. Yes.

Q. Some of which, I believe, you have closed, and some of which are still pending? A. That is correct.

Q. Mr. Mahaffey, I believe you had some correspondence, did you not, with Mr. McDowell? A. I did.

Mr. Watson: If the Court please, I object to the introduction of any evidence as to correspondence Mr. Mahaffey had with Mr. McDowell, as being entirely irrelevant to the Mertia Callaway case.

Judge Collet: Overruled.

The Witness: May I make a correction as to the owner-[fol. 357] ship? Some of those tracts I owned in part or held as a representative of others interested in them.

By Mr. Blanton:

Q. But you were partly interested in some and wholly interested in some others?

A. No—that is the case, yes, but there was more that I held as agent, that I was not any part owner in.

Q. I believe I asked you to bring along a certain letter.

A. I did (producing documents).

Mr. Blanton: I ask that these be marked Government's Exhibits 3-A, 3-B and 3-C.

(The documents last mentioned were marked as requested.)

Q. Mr. Mahaffey, I hand you Government's Exhibit 3-A, and I will ask you if you received that letter through the mail. A. Yes, sir.

Q. I show you Government's Exhibit 3-B, which seems to consist of two sheets, one on the letterhead of R. Newton McDowell, Land Optioner for United States War Department, which seems to have no address, and which has no signature, and ask you if that is the document which is referred to as being enclosed in Government's Exhibit 3-A.

A. That is.

Q. This Government's Exhibit 3-C seems to be addressed to you and to be signed by McDowell: When, and [fol. 358] under what circumstances, did you obtain Government's Exhibit 3-C?

A. My impression is—I am not certain of it, but my impression is that with 3-A came this unsigned copy.

Q. That is correct.

A. (Continuing) And that the other one was sent, it seems, as part of a general mailing operation, to all of the farmers, all the landowners.

Q. In other words, it came in a separate envelope, apparently, and was really a duplicate, except that it bore your address and also bore the signature of Mr. McDowell?

A. Yes, sir.

Q. Subsequent to the receipt by you of Government's Exhibits 3-A, 3-B and 3-C, did McDowell get in touch with you? A. Yes.

Q. And you entered into certain option agreements with him? A. Yes, sir.

Q. I notice McDowell makes reference here to your acquaintance with Colonel Valliant: Did you attend West Point at the same time that Colonel Valliant did?

A. I did; we were in the same class.

Q. And were classmates for a period of four years, were you? A. Three years.

Q. And I believe for some time after your graduation you remained in the Army?

[fol. 359] A. No. I didn't graduate. I left there after three years, and it was four years later I went back in the Army.

Q. I believe you bear the military title of Captain Mahaffey? A. Formally, yes.

Q. For three years you were a classmate of Colonel Valliant? A. Yes.

Mr. Blanton: Now, I would like to offer in evidence this Government's Exhibit 3-A, which is the original, of which Senator Williams identified a copy from his files yesterday.

Mr. Watson: We object to the offer on the same ground heretofore stated.

Judge Collet: Same ruling.

Mr. Blanton: This is on the letterhead of "R. Newton McDowell, Incorporated, General Contractors, Midland Building, Kansas City, Missouri, R. Newton McDowell, President, L. R. Peairs, Vice President"—

I call attention to the fact that this letterhead is different from the letterhead of the enclosure, which describes him as "Land Optioner". It seems to be a general contracting letterhead.

(Reading Government's Exhibit 3-A):

"October 26, 1940.

Mr. Birch O. Mahaffey
Missouri Pacific Building
St. Louis, Missouri.

[fol. 360] Dear Mr. Mahaffey:

I have been given a contract by the War Department to acquire a site of land located in St. Charles County com-

prising approximately 20,000 acres upon which a T. N. T. plant will be built. I understand you have certain holdings within the site area.

I am more in particular representing Colonel R. D. Valliant, Chief Procurement Officer, Real Estate Section, Quartermaster Corps, War Department, and Colonel Valliant remarked to me that he was in your class at West Point and to tell you that he disliked to have to disturb your holdings but this is an urgent military matter and he was quite sure you would fully appreciate the circumstances. He added that he was anxious to see that you get out whole on the transaction and was hopeful that you would be thoroughly satisfied.

We have just completed running the records in St. Charles County and I have written a rather longwinded letter which we are mailing to all the farmers in that section in which I have attempted to convey the attitude of the War Department. In case you are interested I am enclosing a copy. We have opened offices in St. Charles and ten of my men will be in there Monday to begin securing these options.

Time is going to be the essence in this effort as they are anxious to get started on the construction almost immediately. I expect to be in St. Louis all of next week and will be at the Park Plaza Hotel after Monday night. If you would have your office call me there and indicate the time Tuesday or Wednesday that would be convenient to you to discuss this matter I shall be glad to call on you.

Yours very truly,

(Signed) R. NEWTON McDOWELL"

Then the enclosure, which was enclosed, reads as follows—they are both alike, except that one is addressed to Mr. Mahaffey and one is not, and one is signed and one is not.

[fol. 361] Q. The unsigned and unaddressed is the one that was enclosed in this letter, as I understand, Mr. Mahaffey?

A. I think so.

Mr. Blanton: This is dated October 24, 1940, two days earlier than the other letter, which was dated October 26, 1940.

(Reading Government's Exhibit 3-B):

"R. Newton McDowell
Home Office
Midland Building
Kansas City, Missouri.

Land Optioner for
United States War Department

Telephone 1091
126 South Main
St. Charles, Missouri

October 24, 1940

We have entered into a contract with the War Department to acquire for the Government certain lands in St. Charles County. We are representing more in particular Col. R. D. Valliant, Chief of the Real Estate Section, Quartermaster Corps, U. S. Army. The land which we are to acquire for the Government is to be used for a munitions plant under the National Defense program. This site will comprise somewhere in the neighborhood of 20,000 acres.

According to the records you own certain property within the site to be acquired. It is the desire of Col. Valliant that you be treated in a fair manner. You may be one who will be glad of the opportunity to sell your holdings. On the other hand your family may have owned this land for several generations back, and you possibly have not given the slightest thought to moving from your particular place. It is fully realized that in the latter case sentiment enters into the picture as well as values and in such cases it is regretted that families will be com- [fol. 362] pelled to give up their homes. However, the National Defense program must go forward and must go quickly. Time is the essence, and as Mr. Robert P. Patterson, Assistant Secretary of War, said yesterday, 'National defense is the paramount issue in American life today, everything else must be subordinated to it.'

This site was chosen by the Government after an exhaustive study of hundreds of sites. The specifications

for a munitions site are many, a great many factors are taken into consideration before one is finally approved. The site is developed by the Ordnance Department of the Army, it is then passed upon by a site committee of the War Department, it is passed upon by members of the National Defense Committee, and I am told on good authority that it is then approved or disapproved by the President. Therefore, you will see this site in St. Charles County has had much consideration.

I have consulted with many owners of property within this site as to their idea of values. This was done prior to the public announcement that this area would be acquired by the Government. I have discussed values with life insurance companies and other lending agencies, and we have checked quite thoroughly land sales in this section for the past year. We now have a rather general idea of what property in this particular area is worth.

However, Col. Valliant has advised me that it is not the intention of the Government to attempt to purchase these holdings at bankrupt sale prices. The Government desires to be fair and it is his hope that all of the owners will be satisfied, however, it goes without saying that the interests of the United States Government must be protected. The Government, as you know, under the law of eminent domain and in the interests of National Defense could go in and immediately enter condemnation proceedings on the entire tract and take possession. However, it is the desire of the Government that each individual be treated as fairly as possible, and that condemnation proceedings will not be necessary. Each individual case will be given careful consideration and shortly one of my representatives will call upon you to take from you an option to purchase, to be given to the United States of America, at a price which I trust will be mutually agreeable.

In the meantime you might be giving this matter some [fol. 363] thought. The time is exceedingly short as it is expected that construction will be started on this particular site in less than 45 days from now. If you have a tenant on your place it will be necessary to discuss this subject with him, so you see much is to be done on your part as well as ours. The cry all over the United States

is to speed up the National Defense program, and the building of this particular munitions plant is a most vital link in the whole plan, as this country is woefully weak in its supply of T. N. T., and it is this important explosive which is to be manufactured in St. Charles County on the site of which your property is a part.

We have just opened an office in St. Charles at the above address, there will be some one there each day and evening.

Yours very truly,

P. S. In the meantime you might be looking up your abstract of title."

That is the communication to which he refers in his letter as being "long-winded" communication.

That is all. Take the witness.

Mr. Watson: No questions.

Mr. Blanton: All right, Mr. Mahaffey. Thank you.

Mr. O'Bryan: I would like to announce that we may want to question the Captain, when our turn comes, but we can get him at the Missouri Pacific Building?

Mr. Mahaffey: Yes.

(United States Exhibits.)

Exhibit G-2.

Mr. Blanton: I would like to offer Government's Exhibit G-2, which is a general letter addressed to the landowners, referred to by McDowell in this communication [fol. 364] of March 22, 1941, which has partly been read by me and the rest by Mr. Watson. In the opening paragraph of that communication he said, "I am enclosing mimeographed communications I have mailed to all the unpaid landowners in the Weldon Springs Ordnance area."

Mr. Coburn: What is the date?

Mr. Blanton: March 22, 1941.

Mr. Coburn: That is the general letter to the landowners?

Mr. Blanton: No; that is not dated, except by reference to the fact that it is referred to in his other communication, and I presume was mailed out about the same time.

(Reading Government's Exhibit G-2):

"R. Newton McDowell
Midland Building
Kansas City, Missouri.

Land Optioner for
United States War Dept.

126 South Main
St. Charles, Missouri

To Unpaid Landowners In TNT Plant Site Area
Weldon Springs Ordnance Works

I enclose herewith copy of a wire I received from Under Secretary of War Patterson and my reply."

I will interrupt the reading of this letter to read the wire and his reply, which was attached to that letter,

[fol. 365] This is the telegram from Patterson to McDowell, which is dated March 18, 1941:

"Mr. R. Newton McDowell
Midland Building
Kansas City, Missouri

Reurtel March 11 To Harry Hopkins Relative To Weldon Springs TNT Plant Near St. Louis Serious Questions Which Have Arisen Concerning This Project Including Lack Of Appraisals And Excessive Prices Resulting In Widespread Criticism Of War Dept. Require That Matter Of Payments Be Submitted For Consideration Of Federal Court Authorities This Policy Adopted Only After Exhaustive And Careful Consideration Your Refusal To Accept Proposed Reduction In Amount Of Commission In No Way Influenced Determination Of Policy To Resort To Condemnation Proceedings Estimated Compensation To Owners Will Be Deposited In Court Within Few Days And Immediate Partial Distribution Can Be Made In Discretion Of Judge The War Dept. Will Welcome Any Offer On Your Part To Cooperate On Renegotiation Of Options At Prices Which Will Warrant Closings On Acquisitions By Direct Purchase And Will Consider Any

Offer From Owners Prior To Conclusion Of Condemnation Proceedings.

Patterson Under Secy Of War Wash DC."

Then the telegram of Mr. McDowell to Assistant Secretary Patterson is dated March 19, 1941, that is, the following day:

"Honorable R. P. Patterson
Under Secretary of War
Washington, D. C.

Reference Your Last Nights Wire Weldon Springs Project. Know Nothing In Law Or Authorizations Requiring Appraisals. Would Appreciate Citation To Requirement. You Will Recall OBriens Investigating Appraisers Reported Would Require Three Months To Appraise Fifty Tracts. I Was Acting According To Written Instructions And Policies Approved By War Department Emphasizing Necessity Of Speed And Expressed Desire Avoidance Condemnation And I Persuaded Landowners In Mass Meeting At Outset To Execute Options With Full Ap- [fol. 366] proval Justice Department And War Department Representatives Against Opposition Some Fourteen St. Louis Lawyers Agitating Landowners Hold Out For Condemnation. My Average Option Prices Including All Cost To Government Of $114 Per Acre For Agricultural Land And $159 For Entire Project Including Towns Schools And Church Property Compare Favorably With Any Other Projects Handled By Any Governmental Agencies Or Condemnations. Glad To Note That My Commission Which Was Fully Discussed With Everybody Concerned Including Some Eight Hundred Landowners Attending Mass Meeting At Outset As Well As All Governmental Representatives Had Nothing To Do With Present Intention To Resort To Condemnation. As To Possible Renegotiation Of Options Must Adhere To My Original Recommendations That Option Prices Fair And Reasonable. If Our Governments Signed Original Contracts Openly And Fairly Negotiated Are Lightly Repudiated As Mere Scraps Of Paper How Can You Expect Citizens To Negotiate Further Contracts. Obviously They Would Require Ample Margin To Cover Similar Contingencies. I Used Argument Of Patriotism Strongly But It Is Now

A Bit Tarnished. Some Lands Held By Fiduciaries Who Can Not Relinquish Binding Contracts And Take Less. Numerous Landowners Have Made Commitments On New Homesites To Which They Were Forced And Now Cannot Meet Payments. They Are Not Sympathetic To Being Made Refugees In Furtherance Of Governments Seven Billion Dollar Program To Prevent Europeon Peoples Becoming Refugees. Sincerely Regret Embarrassment To You Occasioned By Fact Your Subordinates Took Ill Advised Snap Judgment That Because Abuses May Have Occurred In Other Projects Elsewhere They Occurred In Mine Which Was Clean As A Whistle And I Have At All Times Welcomed Fullest Investigation by Impartial Competent Investigators. Suggest Most Satisfactory And Honorable Solution For War Department To Announce That Its Written Contracts With Its Own People Are Binding And Dependable And Will Be Honored Not Repudiated. I Am At All Times Anxious To Cooperate With War Department.

R. NEWTON McDOWELL"

Now I will continue with the letter that McDowell, after the transmitting and receipt of those two telegrams, wrote to the landowners:

"I enclose herewith copy of a wire I received from Under Secretary of War Patterson and my reply.

[fol. 367] I negotiated your option in good faith and it was accepted by the War Department. I could make a speech for hours on the subject of the Government repudiating its obligations but apparently the powers that be are not impressed with this line of reasoning.

I have been wondering whether or to what extent some of you would suffer by reason of condemnation proceedings which have been announced by the Under Secretary of War. Obviously this will impose on you the burden and expense of lawyers' fees, expert witness fees and possible appeals by the Government—also Government counsel claims that no disturbance damages will be allowed if the condemnation proceedings go through. All this is of course utterly unjust and a matter for which neither you nor I is responsible.

You will note that the Under Secretary of War has asked me to cooperate in renegotiating lower prices on accepted options and you will note my reply. Therefore I am not urging you to do anything. You know the state of your own affairs. You know how badly you need money immediately. It may be better for you to take a realistic view of this thing and determine in your own mind whether or not you can afford to carry on this legal fight or whether it would be advisable for you to offer to the Government a reduction of 10% or 20% or whatever percent you are willing to take on your present option price providing the Government will pay you the cash within ten days. This is not a trading affair. You will have to determine your percent and stand on it.

I understand condemnation proceedings are to be filed immediately and time is the essence—whether or when they will be I do not know. Therefore I authorize you to wire me collect as follows:

Pursuant to your letter or March 20 you are authorized to transmit to War Department that I will agree to a % reduction in my option contract price previously accepted by the War Department.

Signed

I repeat I am not urging you to do anything and I have exhausted myself on the subject of repudiation of obligations by the Government.

[fol. 368] Yours very truly,

(Signed) R. NEWTON McDOWELL."

(Government Exhibit GU-4)

Now I would like to offer a couple of paragraphs from this memorandum which McDowell gave Mr. Weisman, reporter of the Globe-Democrat, which is Government's Exhibit GU-4. It consists, on the whole, of a self-serving statement by McDowell, but there are a couple of paragraps which we think contain admission which are helpful and pertinent in this case.

Mr. O'Bryan: We object to the introduction of these paragraphs from the statement made to a newspaper reporter, for the reason that it is an improper way to introduce evidence. McDowell is in the court-room. If Mr. Blanton don't put him on as a witness, the defendant will. We have thus far in this case, seemingly, put to one side all the rules with reference to evidence, the admissibility of evidence, the right to examine witnesses and to cross-examine, and let them speak for themselves. We should try this case in a proper manner, according to the rules of evidence, and we object to counsel at this time introducing a couple of paragraphs from some statement made and handed to somebody else, penned by McDowell, for the reason that McDowell is neither a plaintiff in this case, neither is he defendant, and any statements that he would [fol. 369] make could not bind either the plaintiff or the defendant in this case. It comes wholly without any rule on earth, that I know of, that can support such an admission.

Judge Collet: The rule of evidence is that where a charge of conspiracy is made, if the evidence has a bearing upon the conspiracy charge it is admissible. If the conspiracy is not established it will not be received as evidence against any of the other parties. That rule is so well known and has been known so long that I * * * the basis for admission of this evidence. If it does not establish conspiracy it will not be binding.

Objection overruled.

Mr. O'Bryan: I repeat the other objection, because this is not a prosecution for conspiracy. This is a condemnation suit brought in law, brought at law, under the statutes. An answer is filed setting forth that there was an agreement—a contract entered into; that the title to the property is already vested in and to the Government, and asks the Court on the law side of the court—not the equity side—to establish the value of that land at the amount fixed.

Judge Collet: We understand that. Now, what is your other objection?

Mr. O'Bryan: My objection is that even this letter, this statement here, does not constitute any evidence of a

conspiracy between McDowell, this defendant, and the [fol. 370] United States Government.

Judge Collet: That will be determined by the evidence itself. Overruled.

Mr. Blanton (reading from Government's Exhibit GU-4):

"A consultant from the National Defense Commission from Washington was sent out to Weldon Springs as were representatives of the United States Department of Agriculture. It was impressed upon me that the farmer, in addition to the value of his land, should receive a disturbance value. The farmer should be compensated for the cost of moving, for the loss of feed he had in his silo, for the loss he might take on the forced sale of his cattle, the cost of relocating himself, etc. All of these items should be allowed and in addition, we should provide for the tenants.

I was given a facsimile of a letter signed by the Assistant Secretary of War, Mr. Patterson, to the Quartermaster General on the subject of 'acquiring sites for ammunition plants' in which the Assistant Secretary of War said, 'The policy of the War Department in connection with land acquisitions for ammunition plants is to secure the good will of the community to the maximum extent possible and consistent with fair prices and the availability of the land at the time and in the location needed.' "

[fol. 371] Now, Your Honor, I want to offer—

Mr. Watson: If the Court please, may we read the rest of it?

Judge Collet: If it has any bearing.

Mr. Blanton: I think it is self-serving. You are welcome to look at it. I think you have seen it.

Mr. O'Bryan: If we object to part of it we ought to put the rest of it in—

Judge Collet: I think, Mr. O'Bryan, if you determine that there are other parts of it which are explanatory of the parts which Mr. Blanton has read, you may read that without waiving your objection.

Mr. Blanton: That is correct. I am perfectly willing that that be done.

Mr. O'Bryan: I just don't like to blow hot and cold.

Judge Collet: All right.

(Government Exhibit 765-1)

Mr. Blanton: Your Honor, I would like to offer in evidence Government's Exhibit 765-1, which is a certified copy of a letter from McDowell to Colonel Valliant, dated November 20, 1940, when he sent in this Mertia Callaway option.

(Reading):

"Col. R. D. Valliant,
Real Estate Branch,
Office of Quartermaster General,
War Dept.,
Washington, D. C.

Dear Sir:

I submit herewith option of Mertia Callaway for 94.68 [fol. 372] acres in Section 23, Township 46, Range 2, for $10,888.20."

Mr. Watson: If the Court please, right at this point I object to this letter, for the reason that the representations made to the Government by McDowell as to the value of this land, if there are any such representations, are not material to the issue, the contract being a contract between Mertia Callaway and the Government.

Judge Collet: Overruled. Who is this letter to?

Mr. Blanton: To Colonel Valliant from McDowell, at the time he sent in the option in question in this lawsuit, sent to Valliant for his acceptance or rejection.

I will read the last paragraph.

"I recommend its acceptance as a fair value to the United States Government.

Yours very truly,

(Signed) R. NEWTON McDOWELL."

I now want to offer in evidence these certified exhibits dealing with the Kolodzey transaction, which have been identified as Government's Exhibits 1001-1, 1001-2, 1001-3, 1001-4 and 1001-5.

Mr. Watson: We object to the offer of those—or to the acceptance of those documents in evidence, on the ground that they have no relation to the Mertia Callaway transaction.

[fol. 373] Judge Collet: What are they, Mr. Blanton?

Mr. Blanton: These are documents, Your Honor, showing that on November 19th, McDowell sent to Valliant an option on the Agnes Kolodzey tract, stating that he recommends its acceptance, at a fair value of $4,500, and a document showing that about five or six weeks thereafter he sent in another letter, on the same tract, and made the same recommendation, but at that time he says the value is $10,000, and the letters passing back and forth—

Mr. O'Bryan: We object to that. We think that McDowell should be put on the stand, or Bolton or the Title Company, to explain the reasons that happened that way. The truth is that an agent, with power of attorney, signed the option for $4,500—

Mr. Blanton: If you wait a minute, that is set forth in one of these letters that I am going to read.

Mr. O'Bryan: I want to put it in my objection and make the objection state the facts, that the Title Company would not accept a deed signed by this agent with power of attorney, and had to send the deed to Texas to be signed by the owner of the property, the sister.

Judge Collet: Is that an objection?

Mr. O'Bryan: That is in my objection. It is incompetent at this time—it is just like someone picked up a snow-ball [fol. 374] with a piece of coal in it and throwed it into this case, and hit the first one that was—

Judge Collet: It may miss you. Objection overruled.

Mr. Blanton: Government's Exhibit 1001-1, shows that the undersigned, Agnes Kolodzey, for the sum of $4,500, offers to the Government a certain tract of land, which is

described, which consists of 64.67 acres of land. It is dated November 16, 1940, signed Agnes Kolodzey by Martha Pallardy, Attorney in fact, and witnessed by J. C. Baker and B. H. Dyer who, you gentlemen recall, is a lawyer from—

Judge Collet: It will avoid the interrupting of this, Mr. Blanton, if you don't commence until after recess.

Mr. Blanton: Thank you, Your Honor.

At this point, at twelve-thirty o'clock P. M., a recess was had until two o'clock P. M.

[fol. 375] At 2:00 P. M., April 1, 1942, pursuant to adjournment, the proceedings continued as follows:

Mr. Blanton: Shall we proceed, Your Honor?

Mr. S. Watson: If Your Honor please, there was a document offered just before recess to which I did not get in my objection. Was it offered or not?

Mr. Blanton: Yes, sir; I was preparing to read it but did not read it, and I thought Mr. O'Bryan had made an objection and it was ruled on.

Mr. O'Bryan: I did.

Mr. S. Watson: The same objection, Your Honor, that has gone before.

Judge Collet: Very well, overruled.

Mr. Blanton: I will read, first, Your Honor, Government's Exhibit 1001-1, which is the form of option that was executed on this Kolodzey tract in the sum of $4500, on a piece of ground which contains approximately 64.67 acres of ground, executed on November 16, 1940, signed Agnes Kolodzey, by Martha Pallardy, attorney in fact, with the power of attorney attached to the option, and which seems to have been accepted by Col. Valliant on the 27th of November, 1940, and was witnessed by Mr. Baker and by Judge Dyer, who, I think, happens to be in courtroom. It is the same general form as the other options.

(Here insert U. S. Exhibit 1001-1)

This exhibit is on file in the office of the Clerk of the Circuit Court of Appeals.

[fol. 376] (Government Exhibit 1001-4)

Mr. Blanton: Now, I would like to read Government's Exhibit 1001-4, which is the letter that accompanied this Kolodzey option, dated November 19, 1940:

"Col. R. D. Valliant,
Real Estate Branch,
Office of Quartermaster General, War Department,
Washington, D. C.

Dear Sir:

"I submit herewith option of Agnes Kolodzey for approximately 64 acres in U. S. Survey 2990, for $4500. I recommend its acceptance as a fair value to the United States Government.

Yours very truly,

R. NEWTON McDOWELL."

Government Exhibit 1001-2)

Mr. Blanton: Then I would like to offer Government's Exhibit 1001-2, which is a letter from Mr. McDowell to Col. Valliant, dated January 11, 1940, which is as follows:

"Dear Sir: Re: W-766-QM-2608

Agnes Kolodzey.

"On November 19, 1940, we forwarded to your office option of Miss Agnes Kolodzey, which was executed by Mrs. Martha Pallardy, attorney in fact. This option was approved by you on November 27th and returned to this office.

"Upon examination of the title and the preparing of the deed by the Kansas City Title Insurance Company, they discovered that the power of attorney held by Mrs. Parlardy was question due to the fact that this power of attorney was approximately four and one-half years old.

[fol. 377] "We immediately contacted Miss Kolodzey, who resides at Yorktown, Texas, and she informed us by return mail that Mrs. Pallardy had been given the power of attorney to execute the leases in connection with the rock

quarry which is on this property, but she had never been consulted and did not know that the Government was proposing to build a T. N. T. plant on her land. She further stated that she was willing to cooperate with us as representatives of the United States Government, but not at such a figure as her attorney in fact had signed for, and that if we would prepare another option in the amount of $10,000 she would gladly sign same and return to this office.

"Taking into consideration that we paid approximately $50 more per acre for the land adjoining Miss Kolodzey's and also in lieu of the fact that we had not consulted Miss Kolodzey in the cirst place, we can see no other alternative than to make up a new option for an increased figure.

"This we have done, and we are enclosing herewith a new option, duly signed and witnessed, together with our photostatic copies of the old option.

"I recommend this as a fair value to the United States Government and trust you will approve same."

The first letter which he recommended as a fair value being dated November 19, 1940, and the second letter being dated Jan. 11, 1941.

Mr. S. Watson: Object also to that document on the [fol. 378] ground it has no relation to the Mertia Callaway matter.

The Court: Overruled.

(Government Exhibit 1001-5)

Mr. Blanton: Then, I would like to read Government's Exhibit 1001-5, which is dated January 18, 1941.

"Mr. R. Newton McDowell,
126 South Main Street,
St. Charles, Missouri.

Re: W 766 "M-2608
Agnes Kolodzey option
to sell land

Dear Sir:

"Reference is made to the above mentioned tract of land which the War Department desired to acquire in the Weldon Springs Ordnance Plant area.

"Pursuant to your telephone conversation with this office regarding the above matter, please forward your request for condemnation of this tract.

"For the Quartermaster General.

Very truly yours,

C. J. HARROLD."

(Government Exhibit 1001-3)

Mr. Blanton: Then Government's Exhibit 1001-3, which is a letter on the stationery of Mr. McDowell, dated February 26, 1941:

"Chief of Real Estate Section,
Office of Quartermaster General,
War Department, Washington, D. C.

In re: 766-QM-2608
Agnes Koldozey

Dear Sir:

"This is in reference to your letter of January 18th requesting this office to forward our request for condemnation on the above tract on which we are unable to obtain an option.

[fol. 379] "As stated in our letter of January 11th addressed to your office, we explained that Mrs. Kolodozey refused to accept our offer as stated in the above mentioned option, but is willing to sign another option for $10,000 net to the Government.

"Since receiving your letter of January 18th, we have written Miss Kolodzey, but to this date have not received a reply. Therefore, we wish to recommend that condemnation proceedings be instituted against this land and immediate possession be requested for the United States Government through the United States District Court in St. Louis, Mo.

"In lieu of the fact that the Government will have to obtain this land through condemnation, it is our opinion that $75 per acre is a fair appraisal for this land.

"We are attaching hereto duplicate copies of the description of the land in question, but are unable to furnish

a plat other than the plat of the area which we furnished your office last week.

Yours very truly,

R. NEWTON McDOWELL."

Bear in mind this is a 64-acre tract and the first option recommended was $4500, and the second option which was sent in about eight weeks later was $10,000.

Mr. S. Watson: Object to that document for the same reason.

The Court: Same ruling.

(Government Exhibit B-2.)

Mr. Blanton: Now, Your Honor, we would like to offer in evidence Government's Exhibit B-2, which is a certified [fol. 380] copy of a letter from R. Newton McDowell to Major C. J. Harrold, dated February 14, 1941. This deals with the Muschany Brothers tract.

Re; W-766-2M-2790 Muschany Brothers

"Dear Sir:

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Springs Ordnance Works area:"

Bear in mind this was February 14th after this option had been sent in.

Mr. S. Watson: At this time I enter my objection to the offer of that document for the same reason—it has no relation to the Mertia Callaway transaction.

Mr. Blanton: "The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordinance Works area:

Garage and 2 lots in Howell,	$3,500.00
Small house in Howell,	1,000.00
Loss of business (Gen. mercantile),	6,500.00
Tenant release,	300.00
Total to Government,	11,300.00

"Muschany Bros. operated a garage and general mercantile store in the town of Howell. They also owned a small house and a couple of lots. Their entire holdings were appraised at $11,300 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement office."

(Government Exhibit B-1.)

Mr. Blanton: And I would now like to offer Govern-[fol. 381] ment's Exhibit B-1, dated February 13, 1941, to Major Harrold, signed By Mr. Bolton for R. Newton McDowell. It deals with the Mike Sutton Estate.

Mr. S. Watson: Object to the introduction of that for the same reason—it has no application to the Mertia Callway matter.

The Court: Same ruling.

Mr. Blanton: "The following is a breakdown on the above mentioned option for land acquired in the Weldon Springs Ordnance Works area:

129.50 Acres of land @ $90 per acre,...	$11,655.00
5 room house, barn, sheds, etc.,.....	1,200.00
Tenant release,.....	450.00
Sub-total,.....	13,305.00

"Owner agreed to sign option for $13,800 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement office."

(Government Exhibit B-5.)

Mr. Blanton: Then I would like to offer Government's Exhibit B-5, being a similar breakdown on the Mary Keiser estate.

Mr. S. Watson: Same objection.

The Court: Same ruling.

Mr. Blanton: Dated February 13, 1941, to Major Harrold, Office of Quartermaster General, War Department, Washington, D. C.

Dear Sir:

Re: W-766-QM-2563 Mary Keiser Estate

"The following is a breakdown on the above mentioned [fol. 382] option for land acquired in the Weldon Springs Ordnance Works area:

6-room (2-story) house.....$	4,800.00
85 acres tillable land @ $60 per acre,...	5,100.00
80 acres pasture land @ $35 per acre,..	2,800.00
30 acres winter wheat @ $6.00 per acre,.	180.00
New fence,.....	25.00
Moving expenses,.....	300.00
Tenant, ...	150.00
Sub-total.....	14,243.07

"The above figure represents what the owner wanted for his land, but we considered this too high and finally agreed to take an option for $13,900 net to the Government.

Yours very truly,

R. NEWTON McDOWELL."

It was $545 in excess of all items that are tabulated in that, but some less than 6½%. It totaled $868.07. It is based also on the moving expense and on this allowance to the tenant. Bear in mind that these breakdowns were sent in long after the option had been sent in and accepted.

(Government Exhibit B-6.)

Mr. Blanton: I next want to offer Government's Exhibit B-6, which is a letter dated February 13, 1941, to Major Harrold.

Mr. S. Watson: Same objection.

The Court: Same ruling.

Re: W-766-QM--#2431 Mrs. Nell Fulkerson.

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Springs Ordnance Works area:

Modern residence and 70 acres land,	$7,000
5% sales commission and 1½% for title and ab. work.,	455
Total cost to Government,	$7,455

[fol. 383] Yours very truly,

R. NEWTON McDOWELL."

(Government Exhibit B-7.)

Mr. Blanton: Next offer Government's Exhibit B-7, which is a breakdown on the Louis Nicolai tract, dated February 13, 1941, addressed to Major Harrold.

Mr. S. Watson: Same objection, Your Honor.

The Court: Same ruling.

Mr. Blanton: "The following is a breakdown on the above option for land acquired in the Weldon Spring Ordnance Works area:

Residence,	$4,000.00
24.35 acres of land,	3,603.50
Deep Well,	213.00
75 fruit trees,	86.00
Other improvements,	278.00
Tenant,	75.00
Sub-total	8,255.50
5% sales commission and 1½% title work,	536.60
Total,	8,792.10

Option signed for $8792 net cost to the Government.

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement office."

(Government Exhibit B-8.)

Mr. Blanton: Next offer Government's Exhibit B-8, which is the same sort of document dealing with the Mildred A. Stewart tract.

Mr. S. Watson: Same objection.

The Court: Same ruling.

Mr. Blanton: Dated February 13, 1941, directed to Major *Harrold.*

[fol. 384] In Re W-766-QM-2438 Mildred A. Stewart.

Dear Sir:

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

40 acres of land @ $50 per acre.....	$2,000.00
Stamp tax,.....	2.20
Recording fee,.....	.50
	2,002.70
Sales commission 5%, 1½% title work,..	130.18
Total,.....	2,132.88

"This option was made out for $2,133 total cost of the Government.

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement office."

(Government Exhibit B-9.)

Mr. Blanton: I would like to offer Government's Exhibit B-9 on the Vincent J. Longeran tract, dated February 14, 1941.

Mr. S. Watson: Same objection.

The Court: Same ruling.

Re: W-766-QM-2918 Vincent J. Lonergan

Mr. Blanton: "The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

5.22 acres of land @ $224 per acre.....	$1,179.00
5% sales commission.....	58.95
1½% title and abstract fee.....	17.68
	$1,255.63

"Owner agreed to sign option for $1,250.00 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL."

[fol. 384a] (Government Exhibit B-10.)

Mr. Blanton: Next document to be offered is Government's Exhibit B-10 on the Morris Muschany tract.

Mr. S. Watson: Same objection.

The Court: Same ruling.

Mr. Blanton: Dated February 14, 1941, to Major Harrold.

Re: W-766-QM-2769 Morris Muschany

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

63.43 acres of land @ $1.25 per acre,..	$ 7,696.75
Soft ball park, modern house, tenant house, funeral home, barn, other outbuildings and 4 lots,.....	15,696.25
2 tenants,.....	175.00
Total cost to the Government,....	24,500.00

"$24,500 was agreed on by all parties concerned with the understanding that the owner pay all costs, including commission, title work, etc."

Mr. Blanton: Bear in mind this was one of the Muschany brothers who got $6500 for lost profits on the mercantile business.

Mr. S. Watson: Object to that remark as testimony outside of the document.

Mr. Blanton: Is there any dispute about that?

Mr. S. Watson: I don't; I do not know the facts, but I do not think anything is pertinent except what the document contains.

Mr. Blanton: If there is any objection I will withdraw [fol. 385] that portion of that remark.

(Government Exhibit B-11.)

Mr. Blanton: Government's Exhibit B-11, dated February 13, 1941, on the Mary Schneider tract; addressed to Major Harrold.

Re: W-766-QM-2610 Mary Schneider

Mr. S. Watson: Same objection.

The Court: Same ruling.

Mr. Blanton: "The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

139.51 acres of land @ $65 per acre	$ 9,068.00
House and lot in Hamburg,	3,500.00
Lot in Hamburg,	200.00
Tenant release,	800.00
Tenant release,	160.00
Sub-total,	13,728.00
5% sales commission and 1½% title work,	892.32
Total,	14,620.32

"Option was signed and approved for $14,620 (off 32 cents) net cost to the Government.

Yours very truly,

R. NEWTON McDOWELL."

(Government's Formal Offer of Excerpts from Volume 10 of Federal Regulations, Title 41.)

Mr. Blanton: Your Honor, I also want to make formal offer of certain excerpts from Volume 10 of the Code of Federal Regulations, Title 41. That is page 7 of Title 41, which is page 1321 of Volume 10 of this Code of Federal Regulations. That is Section 12.2 U. S. Standard Form, Revised, which is Standard Forms of Contract. And I call [fol. 386] particular attention to Paragraph 11 of that form, which reads as follows:

Judge Davis: What page?

Mr. Blanton: Page 7 of Title 41, and page 1321 of Volume 10, Your Honor.

Mr. S. Watson: Object to that on the ground it is wholly immaterial and inadmissible.

Mr. Blanton: It shows a recognition of the Government of that section of the Act of Congress which requires that all contracts contain this provision, that no Member of Congress shall have any interest in the transaction, which is not in this option agreement.

Mr. O'Bryan: That will make it void.

Judge Collet: It may be admitted for such purposes as it may become material for, subject to the objection.

Mr. Blanton: And I call particular attention to Paragraph 11 of this Form:

"No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation or company."

Judge Collet: That is the provision you referred to in your reply?

Mr. Blanton: That is right; that is Section 22 of Title [fol. 387] 40—is it not?

Mr. Blanton: I would next like to refer to Construction Contract, which is Section 12.23, found at page 12 of

Title 41, entitled "Construction Contract," which is found at page 12 of Title 41 of this Code; at page 1326 of Volume 10, and particularly paragraph 14 of that Form which contains the same identical provision, "No Member of or Delegate to Congress, or Resident Commissioner," etc.

Mr. S. Watson: Object to that for the same reason.

Judge Collet: It is admitted on the same ground.

Mr. Blanton: I next want to read Supply Contract; Formal No. 32, which is found at page 34 of Title 41 and at page 1348 of Volume 10, and particularly paragraphs numbered 10 and 11. Paragraph 10 is this same paragraph which says, "No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share," etc.

Paragraph 11: "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee."

It deals with the allegation in our reply on the brokerage and contingent fee contract.

Mr. S. Watson: It is understood we are objecting all along to all the book forms he has got.

[fol. 388] Judge Collet: It may be understood.

Mr. Blanton: I next want to refer to Short Form Contract No. 12.33, U. S. Standard Form No. 33, beginning at page 37 of Title 41 and page 1351 of Volume 10, and particularly to paragraph No. 4, which reads: "No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit."

Mr. Blanton: And then I would like to offer at page 49 of Title 41, and page 1363 of Volume 10, the form of Telephone Service Contract No. 40, and particularly the last paragraph of that contract which reads: "No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or

to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit."

Mr. Blanton: Then I would like to go back to page 15 of Title 41 and page 1329 of Volume 10 and refer particularly to paragraph 12, Contingent Fees: "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee." "It shall give the Government the right to terminate this contract," [fol. 389] etc.

(Government Exhibit A.)

Mr. Blanton: Your Honor, I would like also to offer in evidence Exhibit "A" which is attached to our Reply, consisting of regulations of the Secretary of War.

Mr. S. Watson: Same objection.

Judge Collet: Same ruling.

(Here insert U. S. Exhibit "A" attached to Government's reply.)

U. S. Exhibit A is on file in the office of the Clerk of the Court of Appeals.

[fol. 390] Col. R. D. Valliant of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination

By Mr. Blanton:

Q. State your name, please.

A. (Col.) R. D. Valliant, Colonel Quartermaster Corps, U. S. Army.

Q. Where is your business or duty at this time, Colonel?

A. Washington, D. C.

Q. How long have you been in the Quartermaster General Department?

A. Since about July 1, 1920.

Q. During the year 1940, were you connected with that department, and particularly with the department charged with the acquisition of real estate?

A. I was. I was Chief of the Real Estate Branch.

Q. How long did you remain in that capacity with that title?

A. From February 17, 1937, until February 4, 1941.

Q. Among the projects which were handed to you for handling, was the Weldon Spring among them?

A. The Weldon Spring Project was one of them.

Q. How long had you known Mr. McDowell before this contract was given to him, Colonel?

[fol. 391] A. About three weeks.

Q. Did you send for Mr. McDowell, or did he look you up?

A. He looked me up; he was referred to me.

Q. This Government's Exhibit M-5 which has been offered in evidence here, that is the contract that you entered into with McDowell, is it, Colonel?

A. That is.

Q. At least, that is a photostatic copy of it, I should say?

A. That is a photostatic copy of it, bearing Mr. McDowell's signature and mine on the last page thereof.

Q. Now, Colonel, I will ask you if at the time you entered into this contract with McDowell, if the Department had any appraisals of this Weldon Spring property?

Mr. S. Watson: If the Court please, object to that; it is entirely irrelevant, incompetent and immaterial whether or not there were many appraisals made of Weldon Spring properties, on the ground that the Secretary of War had the discretion to purchase this property under law providing for the transactions.

Judge Collet: Overruled.

A. They had no appraisals of the property prior to that time.

Q. I wish you would state what procedure was followed in this Department when one of these options was received.

[fol. 392] Mr. S. Watson: If the Court please, I object to that on the ground that it has been shown here in the evidence that the documents were signed, the contracts were signed by Col. Valliant. The procedure that was followed in the Department is entirely irrelevant and im-

material, it not being competent to go behind a signature on the contract.

Judge Collet: Overruled.

Q. What procedure was followed by your Department when one of these options would be received in the Department?

A. We had under way, in connection with the expediting of the National defense, about 108 separate projects totalling about fifty million dollars worth of property to be acquired. I had at my disposal three commissioned officers and about forty-one civilian employees, and the work was apportioned among certain ones of these employees. In the Acquisition Section there were seven men who were experts in their line of work, and to one of these the particular option would be assigned, depending on whether that was his case or not. His instructions were to examine it, to examine the papers that accompanied it and, if it appeared to him to be in accordance with the project and with the amounts that we expected we would have to pay for it in that region, to approve it and send it to me for signature.

Q. I hand you the option in this Mertia Callaway case which seems to be 2596, and ask you if that is your signa- [fol. 393] ture on the acceptance on the bottom of that, Colonel?

A. That appears to be my signature.

Q. I also hand you Government's Exhibit 765-1, which seems to be a letter accompanying that option, signed by Mr. McDowell and addressed to you.

Mr. S. Watson: Object to that on the ground that it is improper and immaterial to go behind a signature of Col. Valliant on this contract. That is the only thing material in the case.

Judge Collet: Overruled.

Q. Were similar letters forwarded with each of these options, by Mr. McDowell, recommending the price set forth as the fair value to the United States?

A. There were, but unless there was something unusual connected with the letter or with the case, the correspondence was not attached to the option, when it was presented to me for signature.

Q. Did you have any independent knowledge of your own, other than what had been recommended to you, by Mr. McDowell, at the time these options were signed on these individual parcels, as to the value of this property?

A. We were relying largely, but not entirely, upon the recommendations of Mr. McDowell in each particular case; but we had under way projects numbering about 2,000 individual parcels in this particular section of the [fol. 394] country, and we were able to compare the price of one with the price of another.

Q. When you say "in this particular section of the country," you didn't have any more in the immediate vicinity of St. Louis, did you?

A. I referred to the agricultural center of the country—Ohio, Indiana, Illinois, Iowa, and Missouri.

Q. The only other one in Missouri was the one up here near Kansas City, was it not, Colonel, at Lake City?

A. The only agricultural one; there was a City project in St. Louis.

Q. That is the Small Arms Cartridge Plant?

A. Small Arms Cartridge Plant, a City project.

Q. How much under the original setup that you estimated this cost would be in dollars, had been allocated to this project?

Mr. S. Watson: Object to that as entirely irrelevant and immaterial, the amount that had been allocated to this particular project having no bearing on this contract.

Judge Collet: Overruled.

A. No amount was estimated by my office for the cost of this project. The estimate was made by the representatives of the Ordnance Department, and the funds of their estimate were the ones that were allocated to us.

Q. And what did that amount to originally when it was first selected?

[fol. 395] A. Without having any files in front of me to refer to I could only say my recollection on that. I think $1,800,000.

Judge Moore: Will you speak louder? I could not hear that.

A. I think it was one million eight hundred thousand dollars.

Q. When these options did come in, what did they total, Colonel?

Mr. S. Watson: Object to that as entirely irrelevant and immaterial what all these options totaled.

Judge Collet: Overruled.

A. Again I have to rely only on memory; I think it was something over two million dollars.

Q. Wasn't it approximately three millions?

A. It might have been somewhere between two and a half and three million dollars.

Q. Colonel, did you reject any of these options other than this one which has been referred to as the Koldozey option, which you had already approved for $4500, and later submitted to you for $10,000?

Mr. S. Watson: Object on the ground, whether he objected to any of these other options is entirely immaterial to the issues in the Callaway case.

Mr. Blanton: It is pertinent for the reason, Your Honor, to show he was relying on the recommendations [fol. 396] that he had and he had accepted those recommendations without question.

Mr. S. Watson: The witness has already testified to the effect that he relied to some extent on these recommendations. He has testified to the extent to which he relied, and therefore this—

Judge Collet: Overruled.

A. We estimated there were between twelve and fifteen thousand individual parcels to be acquired under the various projects.

Q. I am not asking you about the various parcels. Direct your answer to this project.

A. This project covered about 270 parcels. My recollection is 121 were accepted and paid for, that 149 parcels were accepted but not cleared through. I do not remember the details of how many were rejected.

Q. Do you remember of having rejected a single one of them, other than this Koldozey one which was rejected?

A. I don't remember that, no, sir.

Q. Colonel, at the time you signed this contract with McDowell on the 23rd of October, 1940, had you ever been in that area of the Weldon Spring out in St. Charles County?

A. I had not.

Q. Had you ever seen it?

A. I had not.

Q. Did you have any knowledge, any independent knowl- [fol. 397] edge of your own, as to values out there in the Weldon Spring area at the time you approved these options, except what McDowell had written to you and this general knowledge you say you had about projects all over the country in this Central area?

A. Making the exceptions which I have included in that answer, I had no detailed knowledge of the prices in connection with the individual parcels out there.

Q. Now, Colonel, I will ask you if you had issued any orders prohibiting removal of the buildings or other removable improvements from the land which you were purchasing? A. I had.

Q. When did you issue those orders?

A. They were part of the general instructions that were given to the various agents, where such details were discussed, that buildings on the land might be needed by the constructer or by the Ordnance Department representatives, and, if so, they must remain. Those buildings which were not needed by the constructer or the Ordnance officers in charge could be removed, provided an equitable amount representing the cost was taken off the option price.

Q. So that, so far as you were concerned, would chicken-houses and brooders be removable if the price on the land was accordingly reduced?

Mr. O'Bryan: If Your Honor please, I want to object to the wording and the verbiage of that question.

[fol. 398] Here, Col. Valliant is offered by Mr. Blanton as a witness in this case, and here Mr. Blanton, ever since he has got on the stand, has been couching his language in such verbiage as to try to lead forth and lead Col. Valliant in his line of testimony that he is going to give here. We object for that reason—for leading.

Judge Collet: Overruled.

Mr. S. Watson: I would like to ask that that question be reread. I had in mind an objection that slipped my mind.

The Court: All right, the reporter may read the question.

(The last preceding question is read)

Mr. S. Watson: I object to that on the ground that the Colonel had already testified to the effect that such buildings were removable only as were not needed by the Construction Department and that the Colonel was not in a position to know what buildings were not needed by the Construction Department at that time, and, therefore, he could not intelligently answer the question.

Mr. Blanton: He was as to whether or not the brooders were needed for a TNT plant.

Judge Collet: Overruled.

A. That was a matter left to the decision of the officer in charge.

Q. If that had been left to you, you would not have objected to it, would you, Colonel?

[fol. 399] A. Not the slightest.

Q. You were not asked about it, were you? that particular transaction?

A. I do not recall any such incident.

Q. Now, Colonel, when you approved these various options, which I believe you stated occurred in every instance except one, according to your recollection, did you approve them on the theory the amount named in the options was the reasonable value of the property?

Mr. S. Watson: Object to that on the ground the Colonel was exercising administrative discretion there and that the Government at this time is not permitted to go into that question; that is not a matter for judicial review and the witness should not be permitted to answer the question.

The Court: Overruled.

A. I did, or else I would not have approved them.

Q. That was the theory on which you approved them, was it not? A. It was.

Q. And by that approval you relied upon the recommendation of McDowell, as stated in those letters, plus whatever general information you may have had from your survey of all the projects in this Central Area?

A. That plus whatever recommendations were made to me by my office associates, particularly the ones who were [fol. 400] directly charged with handling each project.

Q. Were there anywhere in your Department appraisals on any of this Weldon Spring property at the time and prior to the time you approved these options?

Mr. S. Watson: Object to that question because it makes no difference whether there were appraisals or not; it is a matter of administrative discretion and the Colonel was exercising that discretion, and it cannot be gone into by this Court.

Judge Collet: Overruled.

A. Assuming that the definition of appraisal is that of one by a licensee or qualified appraisers, there were not.

Q. Now, Colonel, there was offered in evidence here this morning, and afterwards identified by Mr. Mehaffy, a letter written to him by McDowell, dated October 26, 1940, in which McDowell makes this statement: "I am more in particular representing Col. R. D. Valliant, Chief Procurement Officer, Real Estate Section, Quartermaster Corps, War Department, and Col. Valliant remarked to me that he was in your class at West Point, and to tell you that he disliked to have to disturb your holdings, but this was an urgent military matter and he was quite sure you would appreciate the circumstances. He added, he was anxious to see that you got out whole on the transaction and was hopeful that you would be thoroughly satisfied."

Did you make any such statement as that to McDowell? That last sentence particularly, that he was anxious to see [fol. 401] that you got out whole on the transaction and was hopeful that you would be thoroughly satisfied?

A. That is an answer that I cannot give in Yes or No.

Q. Why can't you, Colonel?

A. Because there was a long conversation had between us.

Q. Did you tell McDowell anything like that?

A. I told McDowell that Mehaffy was my classmate at the Military Academy in West Point; that somewhere between 1928 and 1932 I had had to take over some property that he owned down in Florida; I think it was on Santa Rosa Island, and here I was again going to have to disturb him in another place.

Q. If I may interrupt, how did you know that he had property out in this Weldon Spring area?

A. Mr. McDowell said to me—this was in Washington in the early stages of the proceedings—that they were being hampered in getting started on the Weldon Spring project because of the efforts that were being made to convince the people that that project was going to be put there, that it might be put in another place, and, furthermore, the Government could not condemn the land; that if they could convince a few of the larger landowners who were prominent in the City or in the County, it would be of great value to them in getting the project started; that, if the big fellow came along, the little fellow would follow in his tracks. He mentioned, he said "One particularly large [fol. 402] holding out there on the Bluff belongs to a man named Mehaffy," and it was then that I asked if it was V Mehaffy, and the rest of the conversation followed.

Q. With respect to the time you signed that contract with McDowell, when did that conversation occur?

A. I think it was after, undoubtedly after.

Mr. S. Watson: Object to the time when he signed the contract with McDowell. The thing that the District Attorney is interrogating about is this letter which McDowell wrote to Mehaffy and the representations made in that letter. He is not interrogating him at this point about the contract.

The Witness: May I examine the letter?

The Court: Yes, sir.

The Witness: The letter is dated three days after I executed the contract with McDowell.

By Mr. Blanton:

Q. Does that refresh your recollection as to whether the conversation with McDowell was before or after the contract was executed? A. It does.

Q. Now, what is your answer?

A. That letter was written and my conversation was after the contract was executed with McDowell.

Q. Do you know how long McDowell stayed in the City? Did you see him any more on that particular occasion after [fol. 403] he had signed the contract?

Mr. S. Watson: Object to that as entirely irrelevant and immaterial how long McDowell stayed in Washington.

Judge Collett: Overruled.

A. He told me he was going to an airport and take the first plane out.

Q. Now, I interrupted you when you were relating your contacts with Mr. Mehaffy, when I interrupted you.

A. May I see the letter again?

Mr. Blanton: Certainly (handing a paper to the witness).

A. I do not recall any exact expression that I used with him. I am not sure that the subject of remuneration or compensation or payment for the Mehaffy holdings came up at that time. The only statement I recall having been made regarding any price to be paid for the Mehaffy holdings was made to Captain Mehaffy himself in the presence of Mr. McDowell and one or two others, and that was in the hotel in St. Louis.

Q. And what was that?

A. I told him that I would not discuss any prices with him, but if his lawyers would get together with Mr. McDowell I was sure that whatever price they agreed on would be acceptable.

Q. Irrespective of what your information might have been about the Central Area about which you speak? Is that right?

[fol. 404] Mr. S. Watson: Object to that.

The Court: Overruled.

The Witness: I did not understand the question.

Q. Well, you stated in reply to some of my questions a while ago that you approved these contracts because McDowell recommended them and because of your general knowledge about the Central Area conditions and the values of the Central Area including lands from Ohio on

the east. Now, if I understand you correctly, you stated that you told Mr. Mehaffy that if McDowell and Mehaffy's lawyer would agree on a valuation, you would approve it?

A. No, sir.

Q. What did you say?

Mr. S. Watson: Object for the reason the District Attorney has placed Col. Valliant on the stand, he is his witness, and the District Attorney insists upon cross-examining his own witness.

Judge Collet: Overruled.

A. No. That if his attorney could satisfy my agent as to the price that should be paid for that, "I am sure that there will be no dispute regarding it."

Q. Well, do I gather from that, that if your agent McDowell approved the option, that your approval automatically followed? A. No, sir.

[fol. 405] Q. It did, however, did it not, Colonel?

Mr. S. Watson: If the Court please, object for the reason he is arguing with his own witness.

Judge Collet: Overruled.

A. I do not remember the details of any of the particular options that I signed. I must have signed some on the Mehaffy tract among the two hundred odd that I signed.

Q. And you signed all of them, too, didn't you, Colonel? A. Either I or one or the other of my assistants.

Q. Either you or Major Harrold?

A. Or, later on, Lieutenant-Colonel Gebhart was authorized to sign.

Q. Now, Colonel, why was this provision in this contract you made with McDowell and in the option contract to be signed by the owner, to the effect that the property owner was to pay this 5% commission, inserted in these contracts and this option?

Mr. S. Watson: Object to that question for the reason that whatever provision Col. Valliant approved in that contract is immaterial at this time, it having been within his discretion as an administrative officer of the Government exercising the administrative power of the Secretary of War to determine that thing, and it cannot be gone behind. It is not a matter for judicial review.

[fol. 406] Judge Collet: Overruled.

A. The method adopted was one taken up under the emergency conditions that prevailed, and it was thought to be the simplest and most expeditious way of reaching a conclusion.

Q. I know, but why did you provide the landowner was to pay the 5% commission instead of the Government?

Mr. S. Watson: Object because it speaks for itself.

Judge Collet: Overruled.

Mr. O'Bryan: Further object for the reason he is trying to go back into all the administrative things that were there and trying to get his witness impeach his own contracts that he entered into.

Judge Collet: Overruled.

A. Because in one single voucher we could provide for the payment of a number of different services.

Q. It wasn't because the section of the Statute which had been adopted just two or three months before, being Public No. 703, which prohibited the Government from entering into a contract by which the Government agreed to pay cost, plus a percentage of the cost contract, was it?

A. No, sir.

Q. You were familiar with that section of the Statute which at that time prohibited the Government paying a percentage of the cost, were you not?

A. That provision of the Public No. 703 came to our at-
[fol. 407] tention.

Q. That was on the books at the time the contract was entered into with McDowell, was it not? A. It was.

Q. That is at page 712 of the Statutes at Large, Volume 54 of the 76th Congress, second and third sessions, which does provide on the face of it; it says, "also the purchase of lands upon which plants are to be erected contrary to the statement of Counsel to the contrary?"

A. The opinion given me was, that applied to construction only, not to the real estate.

Judge Moore: I wish the witness would speak louder. I can't hear him.

A. The opinion given me was, Public 703 applied to construction contracts and not to contracts for the purchase of land.

Judge Collet: Will you ask the witness about other contracts?

Q. Did you enter into any other contracts like this, and, if so, how many others?

A. Eight in all I think, on a fee basis, and two a lump sum basis.

Q. In other words, two on a fixed fee basis rather than a percentage of cost basis, if I understand you, when you pay the lump sum basis?

[fol. 408] Mr. S. Watson: Object to that on the ground the question assumes this was on a percentage of cost basis.

Mr. Blanton: The contract shows on its face it was.

Judge Collet: Overruled.

Q. As I understand it, there were eight whereby the property owner was to pay the commission on land that the Government was buying on a percentage basis, and two where the Government was to pay a fixed sum for his services? A. Right.

Q. And all the others, you say you had over 100 of them, on what basis were those contracts handled?

A. Some were handled by myself personally, or by other officers in my office; some were handled by other agencies of the Government, such as Soil Conservation Service, and Forestry Service, and Home Owners Loan Corporation.

Mr. Blanton: I think you may take the witness. Wait. May I ask just one more question?

By Mr. Blanton:

Q. These regulations to which you refer, the Army regulations, were all written or printed were they not? or mimeographed, were they not, Colonel?

A. Pretty nearly all of them are printed; some come out in mimeograph form and later on are superseded by the printed copy.

Mr. Blanton: Yes, sir; that is all right.

Cross-Examination.

By Mr. S. Watson:

Q. Colonel, I believe you testified that at the time that [fol. 409] you signed the contract with Mr. McDowell, which was shown you by the District Attorney, that you had never been here at this area?

A. That I had never been at the Weldon Spring site.

Q. Were you at the Weldon Spring site at a subsequent date? A. I was.

Q. What time, about, was that date?

A. About November 8, 1940.

Q. What was your purpose in going to the Weldon Spring area at that time?

A. To familiarize myself as well as I could, in a quick trip, of the nature of the country, the topography, the surroundings, and the general condition of affairs there.

Q. Now, I believe you testified that you were in charge of quite a number of other land acquisition projects at that time? A. I was.

Q. Did you visit any of these other projects?

A. I visited a great many of them.

Q. Can you state what projects you visited, or state some of them that you can remember of?

A. By referring to some notes I can tell you almost completely.

Q. Have you those notes available, Colonel?

[fol. 410] Mr. Blanton: I don't want to keep anything out that touches the case even side, edge or bottom.

Mr. S. Watson: The purpose is to show that it was a policy of the Colonel, or whether or not it was a policy of the Colonel, to familiarize himself with the land in the areas under his charge.

Mr. Blanton: The question he was about to ask him, if he had some notes on these trips to these hundreds of projects he had in charge. I am objecting to any evidence about that; but any evidence he can offer that shows his familiarity with or knowledge of this site, we have no objection; but the other is incompetent.

Mr. S. Watson: Anything that shows his general policy about the land.

The Court: I do not see that we are really concerned about the question, but do you have such notes?

The Witness: I have such notes.

The Court: It is material, then. If he didn't have, it would settle it. What do you want to know, Mr. Watson?

Mr. Watson: The question of his exercise of his administrative functions has been gone into?

The Court: Yes, sir; now if you have in mind the extent of his information as to values, following out Mr. Blanton's inquiry, that is all right, I should think; but if you have in mind a detailed scrutiny of his information about these [fol. 411] other plants, the chances are that a great part of that is confidential, is it not, Colonel?

A. I think it could be made public in a court or lawsuit.

The Court: We will come to that when we get to it. Direct his attention to some specific matter.

Q. Col. Valliant, did you go to the Wilmington, Illinois, area? A. I did.

Q. What was your purpose in going there?

Mr. Blanton: We think it makes no difference what this purpose in going to the Wilmington, Illinois, area was.

Mr. S. Watson: I think it is material for the purpose of showing whether or not it was a practice of Col. Valliant to familiarize himself to some extent with the areas under his charge for purchase, and this type of contract.

Mr. Blanton: If he can show he did that in connection with this property, I will not object, but going to some other project would not familiarize him with this project.

Mr. Watson: It shows the policy the man adopted.

The Court: All right; the question is whether you went to Wilmington, Illinois?

The Witness: I did, on two or three different occasions.

By Mr. Watson:

Q. What was your purpose in going to Wilmington, Illinois, Colonel?

A. To examine the proposed site and familiarize myself [fol. 412] with its topography and condition, agriculturally, especially, and anything else that might be of value to me in considering the price that would be fair to pay for the land?

Q. Did you go to a project in Iowa?

A. I visited the project at Burlington, Iowa, before coming to Weldon Spring, and, after leaving Weldon Spring, I went to Indianapolis, and then to Washington.

Q. When you went to St. Louis to the Weldon Spring area, describe what you did with reference to visiting the area, with reference to familiarizing yourself with the area?

A. I was accompanied on that trip by one of the assistants in my office, an attorney named C. C. Bickford. We arrived in St. Louis from Burlington on the early morning train, and, after having had breakfast, we went to the Park Plaza Hotel.

Q. You said "Burlington," you don't mean "Burlington?"

A. No, sir; from Burlington, Iowa. We there met Mr. McDowell, and in his room we afterwards met Mr. A. C. Ringland, and a representative of the Missouri Agricultural Department, whose name I have forgotten—Morin, I think it was. Later on, Captain Mehaffy came in for a few minutes. We spent the morning discussing various matters connected with the acquisition of the Weldon Spring site, and, after lunch, went to St. Charles, Missouri, to Mr. McDowell's office and met some of his employees there, and then drove around and over and crisscrossed throughout the site, returning to St. Louis just about in time, to catch a six o'clock train.

[fol. 413] Q. Now, you spoke of Mr. Ringland; you say you met Mr. Ringland? A. I did.

Q. Where did you meet him?

A. On that particular day in Mr. McDowell's room in the hotel.

Q. Did you meet Mr. Ringland on any other day?

A. On many other occasions I met Mr. Ringland.

Q. I mean on the occasion of these trips, did you meet him at any other time?

A. No, sir; he was leaving that same night, I think, for Burlington, Iowa.

Q. Did you discuss matters relating to the project with Mr. Ringland at that time? A. I did.

Q. Who was Mr. Ringland?

A. Mr. Ringland was an assistant to the Deputy Commissioner of the Advisory Commission of Council of National Defense in Washington, D. C.

Q. Who was his superior, immediate superior?

A. Mr. Ringland's immediate superior was the deputy, Mr. Hutson—J. B., I think the initials are; and his immediate superior was the deputy himself, Mr. Chester Davis.

Q. Is that the Chester Davis who is now at the Federal Reserve Bank in St. Louis, or do you know, Colonel? [fol. 414] A. I know that it is; he told me so himself.

Q. I believe you testified that you discussed matters pertaining to this project with this Mr. Ringland?

A. I did.

Q. What matters did you discuss?

A. We discussed especially the matters connected with the mass meeting that had been held at one of the school houses on the site, about two nights before, something that had come up there, that was especially bothering Mr. Ringland, and that was statements which had been made by lawyers that there was no law under which the Federal Government could condemn that property and take it away from the landowners; and he asked me if there were such a law, and we told him that there was. He asked us if we could give him citations about it, and we said we could, and we did. He said he wanted to incorporate that in a letter which he was assisting in drafting, that could be circularized among the landowners in the Weldon Spring project, to convince them, first, that the project was going to be carried through; and, second, that if any negotiations were not concluded with our agents, that the Government could and would condemn the property. Mr. Bickford hastily wrote out references and citations, and I think they were quoted verbatim later on in a three or four page circular letter that was sent out by a Committee to the landowners.

Q. You speak of Mr. Bickford, who was Mr. Bickford? [fol. 415] A. Mr. Bickford is a civilian employee of the War Department, who was one of my assistants in the

Real Estate Branch, an attorney by training and an employee of long service in that particular office.

Q. You say he referred to some citation of laws relating to condemnation? A. Yes, sir.

Q. Now, did you speak of a letter a while ago, in your testimony? I think you did? A. I did.

Q. Would you recognize the phraseology of that letter, if it were presented to you?

A. I would recognize the part that pertains to the information that we drafted. The letter as a complete whole was not in existence then.

Q. It was not in existence? A. No, sir.

Q. What was it that you drafted, substantially? I will ask you if you find any paragraph or language or phraseology in that letter there (handing letter to the witness) that you recognize?

Mr. O'Bryan: Mr. Blanton has had that letter identified. You have had this letter identified?

Judge Collet: Exhibit 11.

Mr. S. Watson: May I have Exhibit 11?

[fol. 416] Mr. Blanton: Yes, sir; we will be glad to give it to you.

Mr. Watson: Colonel, I beg your pardon for interrupting you there. I had rather you look at Exhibit 11 and see whether you recognize any of the phraseology in that letter?

A. The quotation on the second page following paragraph 5 and continuing over on the third page to paragraph 6, all in quotation marks, appear to be exactly as drafted by Mr. Bickford, at my direction.

Mr. Blanton: Does that refer to the right of condemnation, Colonel? A. Yes, sir.

Mr. Blanton: That is all that refers to?

A. That is all that refers to, and it contains also statement that the right of eminent domain has been exercised by the War Department throughout the United States in acquiring the land for agricultural purposes in at least forty or fifty cases during the last three and a half years

during which I, Col. Valliant, have been on duty in Washington as Chief of the Real Estate Branch of the Quartermaster Corps of the War Department.

Mr. Blanton: That is the only portion of the letter you recognize as having been prepared while you were there?

A. The portion in quotation marks in there; but other matters in this were discussed.

[fol. 417] Q. (Mr. Watson) What was discussed, Colonel? Keep the exhibit, now. You say other matters were discussed, what was the general tenor of the matters that were discussed?

A. It was the fee situation as presented by Mr. McDowell that was discussed. And particularly, though, it was the right of the Federal Government to institute condemnation proceedings.

The Court: Are you at a convenient stopping place?

Mr. Watson: Yes, Your Honor.

Judge Collet: Recess for ten minutes.

Thereupon, at 3:30 P. M. April 1, 1942, a recess of ten minutes was announced; the proceedings then continued as follows:

Q. (Mr. Watson) Colonel, at the time of the recess, I believe you had just testified that the matter of McDowell's commission was discussed on the occasion of this meeting, had you not?

A. The subject was mentioned that that was discussed or presented at the mass meeting that was held a couple of nights before.

Q. Oh, the subject had been mentioned that that was discussed at the mass meeting?

A. Yes, sir.

Q. Well, was there any discussion of that matter beyond that?

A. No, sir; that was not a matter for discussion between ourselves; that was a fact.

[fol. 418] Mr. Blanton: What was a fact, Colonel?

A. That there was a commission that was to be paid to Mr. McDowell by the landowner.

Q. (Mr. Watson) That was embodied in the contract?
A. That was embodied in the form of option contract that was drawn up in my office.

The Court: I wish you would have the witness explain a little bit more about that contract, the form of contract.

Mr. Watson: Very well, Your Honor.

Q. How did you happen to enter into a contract which provided for the payment of a commission by the vendor?
A. In order to go fully into that subject, I might have to cover the entire situation as it existed in my office during the latter half of the calendar year 1940.
Q. I would like you do that, Colonel, insofar as you think it is necessary to cover that situation in going into that question.

Judge Moore: I would like to hear a little more about that. It is an unusual thing to require the landowners, to make it a provision they have to pay somebody a commission of that sort. I would like to hear a little more explanation about that. I am going to have to try one of these cases on stipulation before me, and I would like very much to hear a thorough explanation of that.

[fol. 419] A. Prior to the fiscal year 1941, there were about thirty-two projects for land acquisition being handled by my office, covering about six and a half million dollars worth of land. The session of Congress—

Judge Collet: Excuse me, Colonel, tell us on what basis that figure was fixed, six and a half million dollars worth of land?

A. Money appropriated and allotted to us for the purchase. With that number of projects and that amount of money, we were able to handle the projects within our own office and with our normal setup; but when we had 108 projects dumped in our lap, covering over fifty million dollars worth of land to be acquired, it was beyond the scope of our organization, and we could not expand fast enough in order to carry the load and to meet the urgent demand that was being made upon us by higher authority to obtain possession of these lands in order that camps, cantonments, target ranges, [manufacting] ammunition plants

might begin to be considered; we then reached out to use the facilities of the other Government agencies, such as the Soil Conservation Service, the Forestry Service, the Home Owners Loan Corporation. In one project in Kansas City we used a corps of engineers, but, with these agencies, we were not obtaining fast enough progress to meet the demand for use in the power plants and in the [fol. 420] manufacturing plants, and it was in connection with the acquisition of these tracts of land that, through a series of developments or gradations from one scheme to another, we did hit upon the Agency method of acquiring the land. As I tried to explain before, the simplest way of covering the entire payments that would be necessary was to have a single voucher to be drawn up that would cover all the payments that would be called on to be made and that would cover the net value of the land to the owner, any taxes that were outstanding that would have to be paid, registration fees, revenue stamps, and whatever other legitimate expenses that were outstanding against the property; and it also would cover the fee of the man who was doing this work for us.

Judge Moore: Who originated this particular plan of payment, Colonel? Who suggested that originally?

A. It followed, I think, upon suggestions made by the Atlas Powder Company in the acquisition of a site near Akron, Ohio, the Ravenna Iron Works, and it resulted from requesting that we take over from them the burden of securing that land. Their first agreement with the War Department was that they would buy, construct the plant, and then bill the Government for the entire cost of it, including the land. That system had been adopted by the DuPont Powder Works in their contract at Charlestown, Indiana. At both places, difficulties were met with, some of them being excessive demands of the landowners for the costs, and others, it was necessary to condemn in order [fol. 421] to clear all difficulties on the title, and so many difficulties were encountered that DuPont said they would never again undertake to buy land for the Government; they would build the plant all right, and operate it, but if we wanted a site, we would have to get it; and the Atlas put up the sort of a complaint at Ravenna, Ohio, and asked us to take over the job which they partially started.

Judge Moore: And you did that in that case?

A. Yes, sir.

Judge Moore: How long was that before this contract?

A. That was sometime in September. I can refer to my notes and tell you exactly. I think it was sometime in September.

Judge Moore: A few months?

A. About two months before.

Judge Moore: Do I understand that there had been a Statute passed only a short time before, that prohibited the Government from paying a commission for this service?

The Witness: The Statute has been referred to, and I would like to have a copy of it and read it to you.

(A book is handed to the witness).

Mr. Blanton: Here is where the Statute begins, Colonel; that is the cost-plus.

A. It provides that "Out of any moneys appropriated by the War Department to provide for the necessary con- [fol. 422] struction, rehabilitation, conversion and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto, including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures as may be necessary for the development, manufacture, maintenance and storage of military equipment, ammunitions and supplies. Provided further, that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

Judge Collet: When was that passed?

A. July 2, 1940.

Mr. Blanton: Approximately four or five months before the time this contract with McDowell was entered into.

Judge Collet: Was that Statute the Appropriation Act that carried that?

Mr. Blanton: This Act entitled, To expedite the strengthening of the national defense.

The Witness: The procedure at Ravenna, Ohio, by the Atlas Powder people had been started on the basis of a 5% commission basis to the agent that they were employing, and that provided for a great many more things than the mere securing of an option. Also, those things were [fol. 423] provided for by us in the subsequent contracts that we made. It provided for the handling of all the details or curing defects that might be found by the Attorney-General's office in the chain of title, or seeing the deed was drawn up, or seeing it was signed, recorded and registered, and that the final settlement was made, and that all outstanding claims were settled, and that everything was free and clear, so that there would be no subsequent come-back, no subsequent basis for disputes or dissensions. All of those were to be covered in the fee that the agent was to receive.

Mr. Blanton: I do not want to interrupt, but, under the Statutes, the Department of Justice is charged with responsibility of seeing that these things are closed properly by examining the deed, and they have the hired personnel to do that.

Judge Moore: Did you understand it when you entered into this with McDowell, that he was to get 5%, and the Title Company was to get 1½% from the vendors in all cases? You understood that?

A. That was understood.

Judge Moore: And was it your understanding that he was to get an amount equal to 5%, and they were to get an amount equal to 1½% of the gross payment? Did you understand that that it was to be done that way?

A. We learned as we progressed, or at least we do not progress unless we do learn; and the wording was so [fol. 424] drawn up that it provided for a percentage on the amount of the gross figure appearing in the option.

Judge Collet: Was it understood by you or by the Department, as far as you know, as to whether or not that

5% was to be added to the property owner's valuation, or whether the property owner was to fix the value and then pay the 5%?

A. It was to be added to the amount, the 1½% for the title covered what practically amounted to an insurance policy on the title to the extent of the amount that the Government was paying.

Judge Collet: That Title Company's commission, was it treated as—as you referred to it—as an assurance proposition? They were a title guaranty company, as I understand it? Did you so understand it?

A. I required it.

Judge Collet: So it was, then, a title bond?

A. It was equivalent to an insurance policy, that they guaranteed that title to the extent of the amount that the Government was paying; and, if it was ten thousand dollars, they were entitled to one fee; if it was fifty thousand dollars, they were entitled to a larger fee, based on the scale of charges for such services, or for such policy of insurance.

Judge Collet: Naturally, this next question occurs to me; I expect to build it up. That being the understanding, why was the contract so drawn that the owner was stated [fol. 425] to be paying 5%? Do you know about that? I do not assume you drew the contract.

A. I did not draw the contracts, but I signed them and read them over, and the object was to obtain a wording that would enable all necessary payments to be made from the one check that would be drawn by the Finance Department.

Judge Collet: Then are we to understand that, insofar as you understood the situation, that the practice to be followed was that the 5% was to be added to the value, and 1½% was to be added to the value, then it was to be included in the total option price, and the reason for doing it that way was in order to authorize or permit the payment of all these amounts in one voucher?

A. And in order to expedite, it was.

Judge Moore: And you understood Mr. McDowell's 5% and the Title Company's 1½% were figured on the gross sum, did you?

A. Yes, sir.

Judge Moore: You understood it was not to be figured on the net sum to the vendor, but on the gross? You understood that?

A. We understood that; but the difficulty is that there is an arithmetical problem that comes into the situation, that we had not taken into consideration, and, as soon as it developed, as soon as they had brought it to our at-[fol. 426] tention, the practice was ordered changed.

Judge Collet: You had not contemplated the result of making the calculation of the 6½% interest on the total not leaving to the property owner the full amount he agreed to take?

A. No, sir; that got by us. Now, that system was followed I think in eight cases, and as soon as the emergency was over, as soon as we had enough land under our control to meet the urgent demands that were made, I say the system was stopped.

Q. (Mr. S. Watson) Was that system used in Burlington, Iowa?

Mr. Blanton: Your Honor, we object to what system might have been used in some other project.

Mr. Watson: I think it is material, Your Honor.

The Court: Overruled.

Mr. Blanton: Note our exception.

A. It was.

By Mr. S. Watson:

Q. Did you O. K. the options in Burlington, Iowa?

A. The first options that were sent in from Burlington, Iowa, were all rejected by me.

Q. By you?

A. Yes, sir.

Q. Why did you reject them, Colonel?

A. Because they looked to me to be too high.

[fol. 427] Q. Why did they look too high to you?

Mr. Blanton: Your Honor, we are going to again renew our objection to going into the details of these other projects. I do not see how it can shed any light on whether they were too high here because they were too high somewhere else.

The Court: One possible purpose occurs to me, if the question is to his knowledge of values there, or method of acquainting himself with values there as compared to here at Weldon Spring. I think, insofar as it may have a bearing on that, that the Colonel should answer the question.

Mr. S. Watson: That is the matter I had in mind, Your Honor—not so ably expressed as by Your Honor.

A. I was comparing that with the values at Weldon Spring and at other places in the states that I previously mentioned.

Q. (Mr. Watson) Now, you mentioned the fact, I believe you gave as your recollection that about $1,800,000 had been the estimate of the cost of the land acquisition at Weldon Spring, did you not?

A. I did.

Q. Now, I will ask you if, when that estimate was made, if the plan contemplated taking of the area that was finally taken in?

A. It contemplated much less.

Q. Much less?

A. It did.

Q. Well, can you state to the Court anything about how [fol. 428] much less, or what the portion was?

A. The original project as conceived for the Weldon Spring site was to cover about 6,000 acres of land, lying wholly south, and I think, east of Highway No. 94. Before we had even gotten started on the project, it was almost doubled, and then before it was finally completed, it was almost trebled in size; somewhere around 17,000 acres was the final amount of acreage to be acquired. The original estimate made by the Ordnance Department officials did not really cover or might not even have been intended to cover the entire project as it was.

Mr. Blanton: I understand, but somebody else, those around, wouldn't know what they were to cover.

A. I talked it over with them.

Mr. Blanton: It is hearsay, then, and we object to it on that ground.

Judge Collet: The only propriety that I see, if this is in connection with the direct testimony that the estimated cost was a given amount, and that the optioned cost was a larger amount, for that reason I think he should be permitted to say at least who made the estimate, if he knows.

Mr. Blanton: He has already said that, Your Honor.

The Court: The War Department.

Mr. Blanton: He said the Ordnance.

The Witness: Officials of the Ordnance Department.

[fol. 429] The Court: Do you know of your own knowledge what the estimate was for, originally?

A. My recollection is it was a million eight hundred thousand dollars.

The Court: I mean the size of the tract?

A. It was over, I am sure it was over 6,000, but it was much less than seventeen. I think it might have been, for the second would have brought it up between ten and twelve thousand.

The Court: The total amount finally taken was 17,000 acres, approximately?

A. Yes, sir.

Judge Collet: All right.

By Mr. S. Watson:

Q. All right. Now, Colonel, you spoke of the demands that were made for acquisition in emergency that exceeded the thing that was involved. What, if anything, have you to say in support of that, that there was a great demand for speed?

A. I can say a whole lot; it depends on how far—

Mr. Blanton: We will concede there was need for speed; we will not raise any issue about that.

Q. Did anyone in the War Department tell you to hurry these things? hurry this acquisition?

A. A number of them did, and the number of the ones in high authority in the War Department urged me to [fol. 430] expedite the procuring of these tracts of land, not only for manufacturing and ammunition plants, but for the camps, cantonments, and target ranges.

Q. Can you mention someone that did?

Mr. Blanton: If he did, the records will speak for themselves. He already testified they made everything by order—let him produce the order.

The Court: Yes, sir; I think the admission covers the subject, the admission Mr. Blanton made that it is conceded there was need for speed.

Mr. S. Watson: I think that is all, Your Honor.

Redirect Examination.

By Mr. Blanton:

Q. Colonel, I believe you said on cross examination that you had made as many as three trips on this project over in Wilmington, Illinois, to inspect it. Now, how much time did you devote to each of those trips?

A. Either a day or a part of a day.

Q. On three different occasions?

A. On three different occasions.

Q. You were here in the St. Louis area, though, just one time, were you not?

A. Yes, sir.

Q. And, if I understand you correctly, you came in from Burlington, Iowa, one morning, spent all morning in the hotel room, and had lunch—am I correct so far?

[fol. 431] A. Correct.

Q. Then you went out to St. Charles and went to McDowell's office in St. Charles and met his office organization, and what else did you do in St. Charles?

A. Stopped by the Abstract Company and saw what the plant looked like, and then rode for two or three hours around, across, up, and down over the city.

Mr. Watson: If the Court please, the witness has testified to that. If this were cross examination, it might be permissible for the District Attorney to ask him to repeat

it, but this is his own witness, and I object to this line of questioning.

The Court: Overruled.

Q. How far is it from St. Charles over to the Weldon Spring area?

A. I think about fourteen miles.

Q. Over what kind of a road?

A. We didn't drive directly out there. I think I went out No. 61, which is a three or four lane, new, paved highway, and then went around the outer limits and came into it over rough, broken, and partly unimproved roads.

Q. How did you get from St. Charles to the Weldon Spring area itself? what road did you go over?

A. I am not sufficiently familiar with the area to describe it.

[fol. 432] Q. What kind of road was it you went over?

A. Either a paved or macadamized road, as I recall it.

Q. You didn't spend over two hours in this entire area, did you? out there where this 17,000 acres of land is located?

A. Two or three hours at the most.

Q. And undertook to go through the entire area in that period of time?

A. The outer rim of it, and back and forth across it.

Q. What kind of roads were they within this area?

A. No. 94, as I remember it, was a fair road; the others were country roads, some of them macadamized, and others in very poor condition.

Q. Can you tell us about any of the parcels out there except possibly the one where there was a small orchard on it, and maybe one where there was a pumping station?

A. I noticed the high schools, I noticed the villages there, and I did pay particular attention to the Ajax Pumping Company plant.

Q. That is a subsidiary of the Shell Oil Company?

A. It may be so; I don't know.

Q. It is not involved in this condemnation because there was a direct acquisition made of that, was there not?

A. So I am told.

Q. Now, Colonel, I will ask you if that was tne only time you were ever out there in that area?

[fol. 433] A. It was.

Q. Now, where did you hold these conferences with Col. Ringling?

A. In a room in the Park Plaza Hotel.

Q. Is that the room where Mr. McDowell was?

A. In Mr. McDowell's room of that hotel.

Q. Is that where Mr. Mehaffy came?

A. Yes, sir; Mehaffy came there.

Q. And this conference was held in the morning before you went to the area?

A. It was.

Q. And did you ever buy or sell any land out there in the area?

Mr. O'Bryan: If the Court please, we renew our objection at this time because the Court understands—

The Court: What objection is that?

Mr. O'Bryan: We renew our objection to Mr. Blanton cross examining his own witness.

The Court: That objection is overruled.

A. Not prior to this time.

Q. Did you have any records before you, when you approved these options, dealing with sales that had been made recently in that area?

A. I think in some of his correspondence with us, Mr. McDowell had referred to some such matters in a few instances, but, as a general rule, you may say No.

[fol. 434] Q. This contract which has been identified as "Governments Exhibit M-5," and which you stated you signed after McDowell submitted it to you, where was that prepared? That was prepared in your office, was it not (handing a paper to the witness)?

A. This was prepared in my office by assistants.

Q. And under your supervision?

A. Yes, sir.

Q. And it incorporates into this option, does it not? and there is a copy of this option, that was prepared in your office, attached to this contract, is there not?

A. There is.

Q. And in neither of those forms is there any statement made as to what the fee to be paid the Kansas City Title Company, is there?

A. The fee to be paid was their standard fee for such service.

Q. Why didn't you put it in the contract?

A. I don't know whether that particular point came up or not.

Q. Were you going to pay any fee they wanted to charge?

A. We were willing to approve the standard fee as shown in their schedule of rates for such services they performed.

Q. Irrespective of what that might be?

A. If it was the standard scale, we accepted it.

[fol. 435] Q. What do you mean by "standard scale?" Do you mean the scale fixed by the Kansas City Title Company?

A. The scale that would be fixed by them for the certificates they were to prepare and guarantee.

Q. And you were not going to make any distinction whether on this 1½% or whether it was for a thousand-dollar contract or a twenty-five thousand dollar title certificate?

Mr. O'Bryan: Object, because what he is referring to is the American Title Association standard fee that is charged by all these title companies in issuing certificates of title.

The Court: He didn't say so—overruled.

Mr. Blanton: We object to Mr. O'Bryan's speech.

Q. The Court says you may answer.

A. My answer is, the certificates required to be furnished by the Title Company were to guarantee the title to the full amount of the payment that the Government was to make to the landowner. If that called for $10,000, we expected it to be at his fee for that amount; if it was $50,000 we expected it to be a larger fee, but we expected the fee to be in accordance with the standard scale for such services and for such guarantee.

Q. Did you expect it to be a graduated fee, or did you expect the 1½% to run whether for one thousand or twenty-five thousand?

A. I think the standard fee was 1½% throughout the country for that.

[fol. 436] Q. Why didn't you put that in this contract, if you were going to pay it?

A. You will note that the option does not have in it the clause relating to the interest of a Member of Congress; that was an oversight. This other might have been an oversight, too.

Q. You put that phrase relating to a Member of Congress in the contract with McDowell, though, didn't you?

A. That was put in there.

Q. But you left it out in the option?

A. It was overlooked in the option; yes, sir.

Q. You put the amount of the commission to be paid McDowell in the contract, did you not?

A. Yes; if it is in there, it is there.

Q. Now, Colonel, I want you to tell the Court why it was you put in this option and contract with McDowell that the property owner was to pay both the Title Company's fee and McDowell's fee, if you understood the Government was going to pay it?

A. Because it was an arrangement whereby the quickest results could be obtained by means of a single document or of a single check.

Q. In other words, you had an understanding with them just contrary to the phraseology of the contract you signed with McDowell?

[fol. 437] A. The understanding was that the fee would be charged and that it would be added to the amount that the landowner was to receive.

Q. Now, don't you know that this fee of the Title Company was not even fixed until long after this contract was signed, and was fixed by Mr. Ewald of the Title Company, with the Emmons Title Company at St. Charles, after you had already signed this contract with McDowell?

A. I didn't know that.

Q. You are telling the Court, notwithstanding the terms of the contract you signed with McDowell, which required the property owner to pay the 5% commission, that you expected the Government to pay it and to be added to the value placed on the property by the landowner?

Mr. S. Watson: Object to that on the ground it is cross-examination of his own witness and argument with the witness and highly objectionable.

The Court: Overruled.

A. I did.

Q. Now, Colonel, I will ask you if you didn't put it in that [praseology] because you knew this law approved by the President in July of 1940, which prohibited the Government paying the cost plus a percentage of the cost—that that act prohibited your putting that in this contract?

[fol. 438] A. I will answer that by saying, No; and I would like to further say that I did not personally draft either the contract or the option; it was done by my legal advisers.

Q. You signed it, though, and approved it?

A. Yes, sir.

Q. And you read it?

A. Yes, sir, I read it, and I am responsible for it.

Q. And you knew it provided that the landowner was to pay the fee, but you had that agreement with McDowell that the Government was to pay it. Is that right?

A. That is right.

Mr. Blanton: That is all.

Recross Examination.

By Mr. S. Watson:

Q. Colonel, where was this contract with the landowner prepared? Where was that form prepared?

A. The option form of contract?

[A.] Yes, sir.

A. It was prepared in my office in Washington, in the Railroad Retirement Building.

Mr. Watson: I think that is all.

The Court: Any further questions, gentlemen?

Mr. Blanton: No; Your Honor.

(Government Exhibit S-1.)

Mr. Blanton: Your Honor, I am not quite sure whether this exhibit, I think Mr. Watson asked for it and I gave him [fol. 439] a copy of the President's letter addressed to the Secretary of War, which has been marked "Government's Exhibit S-1", but I have not heretofore offered it. I do

not know whether Mr. Watson offered it, but if he didn't, to be safe I would like to offer this letter which reads as follows:

"The White House
Washington

Oct. 17, 1940.

"My dear Mr. Secretary:

"Under the provision of the Act of September 9, 1940, (Public No. 781, 76th Congress) and upon the recommendation of the Council of National Defense and the Advisory Commission thereof, I hereby give my approval to the following project under the War Department program for expediting production in connection with the existing National Defense Programs:

"Construction of a TNT and DNT Plant
at Weldon Springs, Missouri.....$14,500,000.

Sincerely yours,

FRANKLIN D. ROOSEVELT."

Addressed to the Hon. Secretary of War.

ROBERT H. FABIAN, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name, please.

[fol. 440] A. Robert H. Fabian.

Q. By what part of the Government are you employed?

A. Office of the Chief Engineers, War Department.

Q. Are you in the Land Acquisition Department of the War Department?

A. Yes, sir; I am Chief of the Condemnation Section of the Real Estate Branch.

Q. Was that formerly a portion of the Quartermaster General's office? A. Yes, sir.

Q. I believe prior to the time you went to the Quartermaster General's office, which in turn was made a part of the Engineers' Division, you were a member of the Department of Justice, were you?

A. Yes, sir; I worked in the Condemnation Section of the Lands' Division of the Department of Justice for about two years.

Q. And you went over to the Department about the same time that Mr. O'Bryan succeeded Col. Valliant?

A. Yes, sir; about seven days later.

Q. And when was that, that you went over?

A. I went there the 17th of February.

Q. I will ask you if you have made a careful search of the records in your Department to see if there were any appraisals or data there which would enable the Chief of [fol. 441] the Real Estate Section to determine whether valuations were reasonable or not with respect to the Weldon Spring Project?

Mr. O'Bryan: We object to this question for the reason it is based on a time subsequent to the time that Col. Valliant left that office, first--

The Court: Overruled.

Mr. O'Bryan: We further object for the reason it is based on a date that is subsequent to the date of the approval of the option in the Callaway case.

The Court: Any further objection?

Mr. O'Bryan: Yes, sir.

The Court: All right; make it.

Mr. O'Bryan: I further object to the evidence being introduced by this witness, who is now Chief of the Engineers' Section, because all the matters that are now being inquired into by Mr. Blanton were asked of Col. Valliant when he was on the stand here as to what happened during the time of the acquisition of this property, and everyone of those questions was asked and completely answered, and this evidence here only goes to accumulate the record in this case and does not prove or disprove any issues before this Court.

The Court: Is there any further objection?

Mr. O'Bryan: That is all.

The Court: Overruled.

A. I have made such a search.

[fol. 442] Q. Did you in searching—I will ask you before that if the office, which is now a portion of the Engineers Department, took over the records that were formerly in the Quartermaster General's office?

A. Yes, sir; after a Statute passed in December, all of the real estate files formerly handled by the Quartermaster General were transferred to the office of the Chief of the Engineers. With that went all the files, money and all the civilian personnel.

Mr. O'Bryan: Will you ask what December that was, Mr. Blanton?

Q. December, 1941?

A. Yes, sir; this last December.

Q. And the search you made, did it cover the records that were in the Department from, say the first of October, 1940, down to the time you made the search?

A. Yes, sir; either I or my assistant, Mr. Burch, under my supervision, examined all the files relative to the Weldon Spring acquisition, from its inception.

Q. I understood you to say you didn't find any such records, any appraisals or data?

A. There were no appraisals in the files, of any type, prior to the ones that were made in the latter part of January. I believe there were ten appraisals made probably the 30th of January, 1941.

[fol. 443] Q. That was after these options had been accepted? A. Yes, sir.

Q. And was made through our office here in St. Louis?

A. Yes, sir.

Q. At the request of your office? A. Yes, sir.

Mr. Blanton: That is all.

Cross-Examination.

By Mr. S. Watson:

Q. Mr. Fabian, were you appointed on a committee to look into the question of the revision of Mr. McDowell's fee as Land Agent, and the fees of the other land agents?

A. Yes, sir; the Committee's scope was broader than the question of agents' fees, however. The Committee was appointed to examine all matters relating to these land acquisition contracts where private agents were involved.

Q. Who was on this Committee with you?

A. Mr. Douglas U. McKay, and Mr. Ewing E. Wright, and myself.

Q. What other land agents' fees were under consideration by you, other than Mr. McDowell's?

A. The one at Burlington, Iowa. The agent's name was Cockerel, I believe; the land agent at Wilmington, Illinois, Will County. I do not recall his name. We examined also Mr.—

Q. Might you recall it, if it were mentioned?

A. Yes, sir.

[fol. 444] Q. Was his name Herman?

A. Mr. Raymond D. Herman of Chicago. And the Indianapolis, Indiana contract with Paul L. McCord, with respect to the Proving Ground acquisition. There was also one in Northern Indiana handled by a Title Company, of which Mr. Charles P. Wattels was president.

Q. Now, in the Wilmington, Illinois, case where Mr. Herman's commission was involved, did Col. Valliant O K. those contracts? Did he sign those contracts?

A. I believe that Col. Valliant did accept some of those contracts. I would not be able to state positively those contracts were accepted by Col. Valliant or by someone else in the office. I think he did.

Q. You think he did?

A. Yes, sir; Col. Valliant could probably verify that.

Q. Mr. Herman took a cut in his commission, did he not?

A. Yes, sir; I believe Mr. Herman's commission was reduced.

Q. And do you know whether or not these contracts in the Wilmington area have been— were they held up for a while or not.

Mr. Blanton: I do not want to keep anything out that is pertinent, but I cannot see the relevancy of this, and I object.

[fol. 445] The Court: It doesn't occur to me, Mr. Watson; what do you have in mind?

Mr. Watson: I have in mind, the proposition I am trying to establish, that the thing that actuated the Department in holding up and refusing to pay the Weldon Spring contracts, when they did pay other contracts OK'd by Col.

Valliant in other projects, was the fact that the land agent in the Weldon Spring case did not take a cut in his commission, and the land agents in the other cases did take cuts.

Mr. Blanton: The record shows a telegram from Under Secretary of War Patterson saying that didn't occur, that was not the cause of it, that that didn't enter into it.

The Court: He may answer the question.

A. Yes, sir; some of them they stopped payment on.

Q. Do you know whether or not Mr. Herman took a cut in his commission? A. Yes, sir; he did.

Q. And do you know whether or not, after Mr. Herman took a cut in his commission, that his contracts were paid?

A. We had appraisals made in that area, and some of them were paid, I believe; others were placed in condemnation, some of which were set down for trial, and some of which have been compromised since.

Mr. Watson: That is all.

Mr. Blanton: That is all.

[fol. 446] Mr. Blanton: Now, Your Honor, we are ready to go into the proof on the question of valuation of this particular tract.

Herbert O. Meyer, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. Drake Watson:

Mr. S. Watson: Now, Your Honor, I object to the introduction of any testimony on the question of valuation of this tract on the ground that the War Department, Secretary of War, constituted the agent exercising administrative discretion in entering into a contract of purchase, and that administrative discretion was exercised and is not subject to review by this Court.

The Court: Overruled.

By Mr. D. Watson:

Q. Where do you live A. St. Louis.

Q. I hand you this aerial map. Did you make the markings on that indicating as No. 1 there the Callaway farm?

A. I merely copied this outline from a map that was handed to me, that that name is right for that particular tract.

Q. That is the one designated as No. 1?

A. Yes, sir; that is it.

Mr. Blanton: Mr. Watson, you had better have that identified with an exhibit number.

[fol. 447] Mr. Watson: Yes, sir; I am going to.

Q. You are not familiar with that property?

A. Well, I have been out there since November, 1940, and been all over it—just from riding by.

Q. Is there anything else, now, that you have done with reference to that exhibit to identify it and mark it on this map?

A. That is all I did; yes, sir.

Mr. D. Watson: All right, mark this as "Government's Exhibit 12." (The map is marked by the witness as requested)

Mr. Drake Watson: That is all.

Cross-Examination.

By Mr. S. Watson:

Q. Did you make that map? A. No, sir.

Q. What did you have to do with this map?

A. All I did was outline these pieces of property in red and put those parties in there from a copy of the aerial map of the area, with the names written in there.

Mr. S. Watson: That is all.

Redirect Examination.

By Mr. D. Watson:

Q. Do you know the Callaway Tract? A. No, sir.

Q. Do you know where it is located?

A. Just from the map.

Q. It is located within the Weldon Spring area, you [fol. 448] know that?

A. Yes, sir.

Mr. D. Watson: That is all.

Here the Government offered evidence as to the question of valuation, testified to by David C. Fetsch.

* * * * * * * *

[fol. 449] (Amendment of Reply, Substance of, Colloquy as to and Allowed to be Filed.)

Thereupon, at 5:00 P. M. an adjournment was announced until 10 A. M., April 2, 1942. The proceedings then continued as follows:

Mr. Blanton: Before proceeding with further testimony in this matter, the Government would like to ask leave to file further amendments, of which I have furnished a copy to opposing counsel, to take care of the testimony that was developed here yesterday.

The Court: Can you give us the substance?

Mr. O'Bryan: If the Court please, we object.

Mr. Blanton: The substance of that amendment is, I have added to paragraph 3 of the original charge, R. Newton McDowell and R. D. Valliant fabricated and contrived and schemed to defraud, and I state here particularly, beginning with paragraphs n, o, p, q and r, beginning on pages 5, 5a and b, setting up particulars wherein Valliant participated in this matter in accordance with the testimony [fol. 450] that was produced here yesterday. Then in other places in the answer where I formerly used the name McDowell, I add the name McDowell and R. D. Valliant.

Mr. O'Bryan: If the Court please, we object to the amending of the reply in this case at this time for the reason that the pleas were all made up prior to each side announcing ready for trial, and the issues were made up, and the issues are now being presented to the Court on evidence, and the attorney for the Government is not entitled at this time to amend his pleadings.

The Court: Is the draft of the amendment in the form of amended [—]?

Mr. Blanton: Yes, Your Honor.

Mr. O'Bryan: If the Court please, it changes the cause of action absolutely; it takes a Colonel in the Quarter-

master Corps of the United States Army and charges him with a crime for which he could be courtmartialed before the War Department of the United States; it makes him a criminal in the language—I have sat here and read it—in the language of this reply, what he has inserted here shows that Col. R. D. Valliant has practiced criminal acts in the rush to get this land for the Government, so it could prepare itself to defend itself. It is a grave attack upon the reputation of an officer of the United States Army, the grossest attack that I have ever heard coming from the lips [fol. 451] or the pen of any man, and we object to any amendment which charges Col. R. D. Valliant with fraud and conspiracy to cheat his Government.

Judge Colict: Mr. Blanton, the question has occurred to me to be on the problem of whether the request is timely as to whether the information on which this requested amendment is based came to you prior to the testimony of Colonel Valliant.

Mr. Blanton: It did not, Your Honor. In fact, it was a very great surprise to us and was contrary to the statement Col. Valliant made to us in our office when we interviewed him last December, in two particulars, and I am satisfied the record ought to further show Col. Valliant is sitting in the courtroom here and is available for further examination, if Your Honor desires to have him testify further, and I might further state, so far as the Government is concerned, if the owner desires in this case that we complete our discussion and recess, and time to meet it, we will have no objection for them to recess to do so.

Mr. O'Bryan: It might be necessary to have to go clear to Washington to get witnesses to testify in this case to uphold the [attach] that the United States District Attorney, the plaintiff in this case, is making upon one of its own officers and one of its own servants who was in charge of this. Here it comes at this hour right at the last or the close of the plaintiff's case in rebuttal and they are asking to make charges. Has the Court seen the charges?

[fol. 452] The Court: Do they differ from the substance as stated by Mr. Blanton?

Mr. O'Bryan: No, sir; they do not.

The Court: All right. What is the necessity for the amendment, Mr. Blanton? I will explain the reason for the question: It occurs to me that the proffered amendment shall not change the issues at all. We might liken it to a situation where a conspiracy is charged without naming all of the conspirators, and in the progress of the trial, another name becomes known, then it is not necessary that all conspirators be named to start with; it isn't necessary that they be named at the end.

Mr. Blanton: Correct, Your Honor, except that in these conspiracies where there is a crimnial offense charged the indictment invariably uses names of firms or people and says "others to the grand jurors unknown." This reply that was limited to McDowell and to the participation and benefits thereof on the part of the land owners, was not known to us until yesterday afternoon when Col. Valliant told his story, and this pleading is made to conform to the testimony that was produced by Col. Valliant in reply to questions brought out. The issue of fraud remains the same, the difference is that it makes allegation that Valliant participated in it and specifies wherein he participated in it.

The Court: I am not sure that I follow your understanding, your reason for the necessity for the amendment. Merely because the reply doesn't use language, "and others unknown?"

[fol. 453] Mr. Blanton: That is correct, Your Honor.

The Court: Would it eliminate the objection that the defendants are making if you simply amended your pleading by the addition of your more or less customary clause, "and other parties?" Do you see what I mean?

Mr. Blanton: We have no objection to the amendment.

The Court: We are loath to inject into the case the issues of a more or less technical nature, unless it is necessary to do so in order to preserve the rights of either of the parties.

Mr. Blanton: Our reply had been drafted on the information we received, which was to the effect Valliant didn't know the commission and title fees were included in the amount. We relied on the information we had to

the effect they were to be paid by the property owner; and, here, he testified yesterday to the contrary of the written contract which he had approved. It is to meet that testimony which was developed yesterday. If the property owner feels that he wants further time to meet this, if he is surprised by the testimony he developed himself, we have no objection to a recess to let him meet that.

Mr. O'Bryan: We are not surprised at the testimony; we are surprised that you at that time tried to charge any of the officers of the United States Government with fraud and conspiracy; that is the surprise. We do not want it to go out to Japan and Germany, and everywhere else, the United States Government is standing here fighting among themselves as to what it is going to do and what it should [fol. 454] do.

The Court: Well, will the Court's action have any bearing whatever upon that?

Mr. Blanton: The facts speak for themselves here.

The Court: The request for the amendment will be as much a part of the Court file, whether allowed or rejected.

Mr. O'Bryan: That is true; that is why I am criticizing.

The Court: Why did you object for the reason the Court, in granting the request, you thought it would have an effect upon Japan and Germany? I ask that question seriously because I am concerned about that; if it will have an effect, I want to know what effect you think it will have.

Mr. O'Bryan: That is all surmise. It might, we don't know.

The Court: I mean what different effect, from the Court's permitting it to be filed, as from the Court's refusal?

Mr. O'Bryan: I am objecting to him asking it, even.

The Court: That is a matter over which the Court has no control.

Mr. O'Bryan: That is true.

The Court: Gentlemen, the requested amendment may be filed subject to any appropriate request in the nature

of a claim of surprise that may come from the defendant; and, of course, in permitting the filing of the amended reply, the action of the Court should not be understood or construed to be an approval or rejection, of course, of the matters contained therein. Is that clear?

[fol. 455] Mr. O'Bryan: That is clear, Your Honor. May we have to two o'clock then? We want to consider this, because Mr. Blanton has asked for this amendment, and we want to do a little thinking.

Mr. Blanton: I will suggest we proceed with the offering of our expert testimony on valuation, and they can consider that later.

The Court: Yes, sir; I think we can go ahead with the question of valuation. There are two reasons for that: It will be necessary for me to suspend the hearing of this case, tonight, until Monday. It is desirable to get as far along with it as we can.

(Here occurred a discussion between Court and Counsel concerning approximate time that would be necessary to complete the hearing)

Here the Government offered additional evidence as to the question of valuation, testified to by David C. Fetsch, Dave Thompson, John F. Briscoe, Charles Cardwell, Forrest Hughes, Roscoe Murphy,

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[fol. 456] The Court: Declare a recess until 2 o'clock.

Thereupon, at 12:30 P. M., April 2, 1942, a recess was announced until 2 o'clock. The proceedings then continued as follows:

Mr. Blanton: Your Honor, may I offer a bit of testimony out of order in order to let one of our witnesses go.

The Court: Very well.

Lieutenant Floyd C. Redick of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. Blanton:

Q. Lieutenant, state your name to the Court, please.

A. Lieutenant Floyd C. Redick.

[fol. 457] Q. Where is your place of duty at this time, Lieutenant? A. Weldon Spring Ordnance Works.

Q. In what capacity are you employed out there?

A. Assistant to the executive officer to the Engineers.

Q. In that capacity, do you have charge of the records, the contracts, in connection with the plant?

A. Yes, sir.

Mr. Blanton: I hand you a document which I will ask to be marked "Government's Exhibit 15", and particularly the first two pages of this exhibit, and I will ask you if this is the form of contract entered into between the War Department and the Fraser-Brace Engineering Company, with certain parts deleted in the interest of the public interest?

(The document is marked as requested)

Mr. S. Watson: Object to any testimony with reference to the contract between the Government and the Fraser-Brace Company. It has no relationship to this transaction.

Mr. Blanton: The purpose of the offer is, Your Honor, to show the improvements out there are made under this very Act of Congress which prohibits this cost-plus-a-percentage-of-cost contracts. The contract shows on its face it was made pursuant to that Act.

Judge Collet: It may be admitted subject to the objection, that there may be some serious question about whether [fol. 458] it would establish that fact independently; but the record should be full and complete, and it may be admitted.

Mr. Blanton: Your Honor, we ask leave to leave just the first two pages of this, which is a printed copy which has been furnished to subcontractors doing work out there, but which shows the form of the contract; and the particular matter I want to call the Court's attention to is the phrase at the bottom of the first page: "This contract is authorized by the following laws: Public No. 703, 76th Congress. Approved July 2, 1940." Then the second page

which refers to "cost-plus-a-fixed-fee design and construction contract."

Mr. Blanton: I think that is all.

Mr. S. Watson: Now, if the Court please, I wish to enter further objection, since I have seen this document. This recitation is merely a self-serving statement on the part of whoever drew up the contract. It does not prove the matter sought to be proven by the District Attorney.

Judge Collet: That may be the one ground upon which it would be admissible for other reasons, but it occurs to me that it would be admissible for that reason, if for no other. It is an instrument that was made, as I understand it between the War Department and the contractor.

Mr. Blanton: That is correct, Your Honor.

[fol. 459] Government Exhibit 15.

Contract No. W 6977 am-1
O. I. No. 1-41

Cost-Plus-A-Fixed-Fee Design and Construction Contract
(Reference to cost, fee and plant capacity deleted)

(Collateral Contract to Contract No. W-ORD-482, dated October 23, 1940 between The United States of America and Atlas Powder Company).

War Department

Contractor Fraser-Brace Engineering Company, Inc. 10 East 40th Street, New York, New York

Fixed-fee .....

Contract for the Construction and Equipping, including the Design and Engineering incident thereto, of a plant for the manufacture of Trinitrotoluene and Dinitrotoluene.

Place Weldon Spring, Missouri

Estimated cost of project .....

Payments to be made by Finance Officer at U. S. Army, St. Louis, Missouri.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following procurement authorities, the available balances of which are sufficient to cover the cost of the same:

ORD 7401 P2-3211 A 0141-01
ORD 7401 P2-3211 A (0141).116-01 Contract Authorization

M. B. BIRDSEYE,
Major, Q. M. C.

This contract is authorized by the following laws: Public No. 703, 76th Congress, Approved July 2, 1940.

[fol. 460] Cost-Plus-A-Fixed-Fee Design and Construction Contract.

This Contract, entered into this 29th day of October, 1940, by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and Fraser-Brace Engineering Company, Inc., a corporation organized and existing under the laws of the State of New Hampshire with principal offices in the City of New York in the State of New York, hereinafter called the Contractor, Witnesseth That:

Whereas, the Government has entered into a contract with Atlas Powder Company, dated October 23, 1940, being Contract No. W-ORD 482, for consultant services in connection with the designing, construction and equipping of a plant for the manufacture of trinitrotoluene and dinitrotoluene including the preparation for and operation of said plant; and,

Whereas, the parties to said contract did contemplate that the Government should enter into a collateral contract for the designing, construction and equipping work provided for therein; and,

Whereas, in furtherance of said agreement, the Government desires to have the contractor, as an independent contractor, undertake the construction and equipping, including the design and engineering incident thereto, of a plant for the manufacture of trinitrotoluene (hereinafter referred to as "TNT") and dinitrotoluene (hereinafter referred to as "DNT") . . . and,

Whereas, the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law; and,

Whereas, as a result of such negotiations, the Secretary of War has directed that the Government enter into a cost-plus-a-fixed-fee contract with the Contractor for the accomplishment of the above-described work;

Now, Therefore, the parties hereto do mutually agree as follows:

Article 1. Statement of Work.

1. The Contractor shall, **********.

[fol. 461] By Mr. Blanton:

Q. Do you have the original signed contract, Lieutenant?

A. A true copy of it, certified as a true copy.

Q. And does the copy that you have conform in the two respects, that I called the attention of the Court to, with this Government's Exhibit 15?

A. Yes, sir, with reference to cost-plus-a-fixed-fee there deleted.

Mr. Blanton: That is all.

Here the Government offered additional evidence as to the question of valuation, testified to by Scott Meyer, Dave Thompson, J. R. Thursby, Charles Harvey.

* * * * * * *

[fol. 462] Robert H. Fabian previously sworn, recalled for further examination, testified as follows:

Direct Examination

By Mr. Blanton:

Q. Mr. Fabian, I believe you testified yesterday that [fol. 463] you had examined the records filed in the War Department concerning this Weldon Spring project?

A. Yes, sir.

Q. I will ask you if you found among the books and records any memorandum or orders or contracts, or anything else, that would indicate that the Government was to pay, in addition to the reasonable market value of the land, these commissions which were to be paid to the negotiator McDowell, and 1½% to be paid to the Title Company?

Mr. O'Bryan: Object for the reason the contract speaks for itself. It has been offered in evidence, and it was set up there and testified to that that was prepared in his office and turned over to Mr. McDowell.

Mr. Blanton: I am talking about prior to this particular evidence sent in by Bolton on February 13th or 14th.

The Court: Overruled.

A. I didn't find any such memorandum.

Q. Did you make a search for all the records?

A. I made a search for everything relating to this contract, and anything that might have a bearing on the issues to be raised in this case.

Mr. Blanton: That is all.

Mr. O'Bryan: No questions.

(United States Exhibits.)

Mr. Blanton: Your Honor, I would now like to offer a [fol. 464] few more documents, then we will rest. I would like to offer Exhibit which I will ask to be marked "Government's Exhibit 16," which is a photostat of a piece of property optioned by the Darst Bottom Drainage District and Protective District No. 2, of St. Charles County, Missouri, under date of the 20th of January, 1941, which was accepted on January 29, 1941, which describes the property as being 5.01 acres of ground, and I particularly call the Court's attention to that portion of this contract or this option, which has run through it, showing the waiving of any commission by McDowell so far as the option itself is concerned, and which bears the initial "OK R. McD."

Mr. S. Watson: Object to the introduction of that in evidence for the reason it has absolutely no relation to

the Callaway transaction, and it is inadmissible for any purpose.

The Court: Overruled.

Mr. Blanton: In and of itself, it is not important, but in connection with these other documents I am going to offer in connection with that, it will become pertinent.

[fol. 465] Summary of Government Exhibit 16

This exhibit is an option executed by the Darst Bottoms Drainage & Protection District No. 2, offering to convey to the government 5.10 acres of land therein described for $3,900.00, in the usual form of option set out more fully in Defendant's Exhibit 1, Case No. 874, and Defendant's Exhibit A in Case No. 807, hereinafter referred to, except there is stricken from Government Exhibit 16 the following paragraph:

"Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction."

This amendment seems to bear the "OK" of McDowell.

[fol. 466] (Government Exhibit 1023-2)

Mr. Blanton: I offer Government's Exhibit marked 1023-2, which is a letter which accompanied that Exhibit 16, written on the stationery of R. Newton McDowell:

"Col. R. D. Valliant, January 21, 1941.
Real Estate Branch,
Office of Quartermaster General,
Washington, D. C.

Re: QM 601.1 C-RE
Weldon Springs Ordnance Plant,
Weldon Springs, Missouri.

Dear Sir:

"Mr. Walter J. Voelkerding, Attorney for the Darst Bottoms Drainage and Protection, District No. 2 of St.

Charles County, Missouri, called at this office several days ago, relative to signing an option on a small tract of land in the Missouri River Bottom which lies within the Weldon Springs Ordnance Works area.

"During our conversation Mr. Voelkerding mentioned the fact that approximately 11 tracts of land in the Missouri River Bottom which we had options on were subject to a drainage tax and would have to be paid either by the vendor of the option or purchaser, who in this case is the United States Government.

"We have made an investigation and it is the opinion of the Kansas City Title and Insurance Co., as well as this office, that due to the fact that we have taken an option on all of the River Bottom Land with the exception of that tract owned by the Darst Bottoms Drainage District, it will be encumbent upon the United States Government to pay the balance of the drainage tax levy for the next five years, which amounts to approximately $3,005.10. Mr. [fol. 467] Voelkerding was in this office yesterday and after discussing the matter with Mr. Ewald of the Kansas City Title and Insurance Co., it is our opinion that the best way to handle this matter would be to include all of the taxes assessed against the property we have under option, and on the 5.01 acres owned by the Darst Drainage District in the option we take on the 5.01 acres. This we have done, and we are attaching hereto said option in the amount of $3,900 and recommend this acceptance as a fair value to the United States Government.

"We are also attaching hereto 2 copies of affidavit submitted by Mr. W. J. Voelkerding which not only shows the yearly assessment and the total assessment against each individual owner of the Bottom land but also cites a decision handed down by the State Supreme Court relative to a similar purchase of land where a drainage tax was assessed against the property.

"I might state at this time that the Kansas City Title and Insurance Co. will not disburse any checks received to date, payable to any of the owners of the land who are subject to a drainage tax until this option has been approved by your office, or some other procedure recom-

mended by your office. Personally, I think this is the quickest and easiest way to handle the matter

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement Office."

There is attached to this opinion of Mr. Voelkerding [fol. 468] in which he has listed 11 tracts, being that of Theo and Anton Lammert, tax $394.50; Sam Cunningham, tax $175.90; Walker Cunningham, tax $203.90; J. Karl Muschany, tax $227.90; Mitchel Castlio Estate, tax $274; George C. Willson, tax $305; B. O. Mahaffey, tax $73; John W. Miller, tax $220.65; C. R. Karrenbrock, tax $306.55; Q. W. S. R. & Investment Company, tax $1063.25; Darst Bottoms, D. D., tax $62.40.

This exhibit in its entirety is on file in the office of the Clerk of the Circuit Court of Appeals

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[fol. 469] (Government Exhibit B-18.)

Mr. Blanton: I next offer Government's Exhibit B-18.

Mr. S. Watson: Object to that on the ground it has no relation whatever to the Mertia Callaway transaction.

The Court: Overruled.

Mr. Blanton: This is a breakdown of this particular parcel.

Mr. S. Watson: Object to that on the same ground.

Mr. Blanton: Addressed to Major C. J. Harrold and is dated February 14, 1941. Re: W-766-QM, which is the number that is assigned to that contract, Darst Drainage District.

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

5.01 Acres of land @ $130 per acre,	$ 651.30
Drainage taxes (as explained in letter 1/21/41,	3,005.10
Notary Fee,	1.00
Recorder's fee,	1.50
Stamp,	4.00
Subtotal,	3,662.90
Sales commission 5%,	183.15
Title and abstract fee 1½%,	54.94
Total,	3,900.99

Option signed for $3,900 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL."

I call the Court's attention to the fact that option was accepted I think in January, and this breakdown was not sent in until in February, after Col. Valliant was out of the department.

(Government Exhibit B-12.)

Mr. Blanton: I would now like to offer Government's [fol. 470] Exhibit B-12, which is the breakdown.

Mr. S. Watson: Object to that on the same ground.

The Court: Overruled.

Mr. Blanton: Which is a breakdown on the Eleanor Hamm option, dated February 13, 1941. Re: W-766-2422, Eleanor Hamm.

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

20 acres unimproved land @ $45 per acre,	$900.00
5% sales commission and 1½% title work,	58.50
Total,	958.50

Option signed for $960 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL."

(Government Exhibit B-13.)

Mr. Blanton: Then I would like to offer a similar breakdown and option in connection with the Awbrey Heirs, which has been identified as "Government's Exhibit B-13".

Mr. S. Watson: Object to that offer on the same ground, Your Honor.

The Court: The same ruling.

Mr. Blanton: Dated February 13, 1941, addressed to Major C. J. Harrold:

Re: W-766-QM-2874 Awbrey Heirs

"Dear Sir:

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

[fol. 471] 69 acres of land @ $100 per acre,..	$6,900.00
Cost of removing tenant from property,..	375.00
	7,275.00
5% commission and 1½% for title and abstract work, ...	472.87
	7,747.87
Stamps, etc., ...	10.13
Total,.....	7,758.00

Yours very truly,

R. NEWTON McDOWELL,
D. M. Bolton, Mgr.,
Procurement Office."

(Government Exhibit B-14.)

Mr. Blanton: Then, Exhibit B-14, being the breakdown on the W. H. Zeyen land, being W-766-QM-2447, addressed to Major Harrold.

Mr. S. Watson: Object to that on the same ground.

The Court: Overruled.

Mr. Blanton: Dated February 13, 1941, and reads:

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

House and lot in Howell,.....	$2,200.00
5% sales commission on 1½% title and abstract work	143.00
	2,343.00

Yours very truly,

R. NEWTON McDOWELL."

Which option in the sum of $2343 accepted by Colonel [fol. 472] Valliant on the 14th of November, 1940.

(Government Exhibit B-15.)

Mr. Blanton: Next offer Government's Exhibit B-15, which is a breakdown on the L. J. Kessler property. Breakdown is dated February 13, 1941.

Mr. S. Watson: Object to that on the same ground, Your Honor.

The Court: Overruled.

Mr. Blanton: "The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

House and lot in Howell,.....	$2,850.00
House and lot in Howell,.....	4,000.00
Subtotal,.....	6,850.00
5% sales commission and 1½% title work,	445.20
Total cost to Government,	7,295.20

"Owner agrees to pay tenant and all other expenses.

Yours very truly,

R. NEWTON McDOWELL."

The option in this case is accepted the 20th day of November, 1940.

(Government Exhibit B-16.)

Mr. Blanton: And then Exhibit B-16, being breakdown on the Oscar L. Snyder tract.

Mr. S. Watson: Object to that on the same ground, Your Honor.

The Court: Same ruling.

Mr. Blanton: Dated February 14, 1941. Re W-766-QM-2421, Oscar L. Snyder.

[fol. 473] "The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

170 acres @ $100 per acre,	$17,000.00
Modern residence,	9,000.00
Barn,	1,500.00
Garage,	150.00
Henhouse,	150.00
Tool shed,	150.00
Other improvements,	500.00
15 acres winter wheat @ $6 per acre,	90.00
Subtotal,	28,540.00
Sales commission 5%, Title work 1½%,	1,855.10
Total,	30,395.10

"This option was made out for $30,395.00 total cost to the Government.

Yours very truly,

R. NEWTON McDOWELL."

(Government Exhibit B-17.)

Mr. Blanton: And the final one is Government's Exhibit B-17, being a breakdown on the Bessie E. Dominick Estate.

Mr. S. Watson: Object to that on the same ground.

The Court: Same ruling.

Mr. Blanton: Dated February 13, 1941, addressed to Major Harrold.

Re Bessie Dominick Estate W-766-QM-2592

"The following is a breakdown on the above mentioned option for land acquired in the Weldon Spring Ordnance Works area:

10 acres of land @ $65 per acre,.....	$650.00
7% to cover all costs,.....	45.50
Total cost to Government, ...	695.50

"Mr. Dominick agreed to option his 10 acres of land at $65 an acre of we allowed 7% to cover all costs such as [fol. 474] sales commission, title fee, stamp tax, recorder's fee, notary fee, etc. Therefore, the above is the only breakdown we have.

Yours very truly,

R. NEWTON McDOWELL."

That was accepted by Col. Valliant on the 27th of November, 1940.

Mr. Blanton: I don't want to burden the record, but we have an ..... from the options in these cases where we offered the breakdown yesterday, and in each instance they show the options were all accepted long prior to this breakdown that was furnished Major Harrold on the 13th and 14th of February.

[Br.] Blanton: The Government rests, Your Honor.

(Motion of Defendant to Strike Certain Evidence and Denial Thereof.)

Mr. O'Bryan: If the Court please, the defendant moves to strike out all the evidence with reference to which the defendant entered into any conspiracy with R. Newton McDowell to defraud the United States Government. We further object and move to strike out all the evidence that the defendant entered into any conspiracy with Col. Valliant—I forget his initials, Col. R. D. Valliant, to defraud the United States Government in the sale of this land.

We further move to strike out all the evidence with reference to the allegations in the Reply, that the United [fol. 475] States Government has been defrauded in the sale of this land.

We further move to strike all the allegations and the evidence permitted to be introduced under them, that there was conspiracy entered into between R. Newton McDowell and this defendant to defraud the United States Government in the value of this land.

We further move to strike out all the evidence that has been introduced with reference to attempting to fix a value on this real estate of a lesser amount than was set up in the offer to purchase which was accepted, for the reason that the law authorizing the Secretary of War or his subordinates to acquire this land, authorized him to acquire it at what he deemed to be a reasonable price.

We further move to strike out all the evidence offered for the purpose of showing a conspiracy for the reason that no conspiracy has been proven.

We further move to strike out all the evidence pretending to show fraud for the reason that any evidence of fraud, and the charge of fraud as alleged in the reply, has not been proven.

Mr. O'Bryan: I think that is all.

The Court (Judge Collet): Denied.

Mr. O'Bryan: If the Court is going to take a recess for a little while, we would like to confer.

[fol. 476] The Court: All right; a 15 minutes' recess.

Thereupon at 3:10 P. M., April 2, 1941, a recess of 15 minutes was announced. The proceedings then continued as follows:

(Further Testimony for Defendant.)

Thereupon, the defendants, to further sustain the issues on their behalf, offered and presented the following evidence:

Here the defendants offered evidence as to the question of valuation, testified to by Leo Doree and R. A. Langenbacher.

. . . . . .

[fol. 477] Mr. O'Bryan: Defendant rests, Your Honor.

The Court: Do you know, gentlemen, when the approxi-
[fol. 478] mate date was that the bridge was opened? the Daniel Boone Bridge?

Mr. Blanton: Frankly, I do not have the least idea, Judge.

A Voice: June, 1937.

The Court: We thought it was about that time. Is there further testimony, gentlemen?

Mr. Blanton: No, sir; they said, "We rest, Your Honor." So do we.

(Oral Motion to Strike Evidence of Various Witnesses and Denial Thereof.)

Mr. O'Bryan: Now, if the Court please, at the close of the evidence, I would like to submit to the Court, in consideration with this case, a written motion to strike the evidence of the various witnesses.

The Court: You may submit it.

Mr. O'Bryan: I haven't got it prepared and drawn up, but I would like to put it in the record on each of these witnesses to fraud and as to conspiracy, as to their testimony.

The Court: Let the record show the oral motion is denied. When you submit those other motions, the same fate will probably fall to them.

The Court: Do you have some further formal matter, gentlemen? (No response)

The Court: The case that has been on trial is finally submitted?

Mr. Blanton: Yes, Your Honor.

[fol. 479] Mr. Blanton: I would like to make this further statement, if I may: I want to ask leave to file, and I will furnish opposing counsel amendments promptly embodying the same contents of this amendment made in this case today, particularly in these two that are to be tried, and I will do it in all of them, Your Honor. May we have a reasonable time in which to submit briefs on this matter?

The Court: I wanted to hear what your desire was about that. What do you suggest in the way of time? I have no preference about it, but I am anxious to know.

Mr. Blanton: I want to try these other cases. We have fourteen alien enemies to try; next week I have to go to Cape Girardeau. If it will not impose, I would like thirty days.

The Court: That will be no imposition on me. I will completely have forgotten the evidence in that time and can approach the matter with an open mind. Will you want to file a brief after that?

Mr. O'Bryan: How many days will it take you to get your mind opened up to listen to what we want to write?

The Court: Let's not go into that. How much time, Mr. O'Bryan?

Mr. S. Watson: We would like to have ten days.

The Court: Do you want to file a reply brief, Mr. Blanton?

Mr. Blanton: If they do it, we will do it.

The Court: Let's have an understanding that the Gov-[fol. 480] ernment's brief will be filed before thirty days from today, unless that falls on Sunday.

Mr. Blanton: I might state we probably might want to file the same brief before all three of Your Honors, and we could have thirty days.

The Court: That will take you over to the 4th of May.

Mr. Gentry: That will cover nearly all of it; there will be a little difference.

The Court: That will take you to the 4th of May.

(Motion of Defendant to Strike Amended Reply of Plaintiff.)

Mr. S. Watson: If the Court please, I would like to ask leave to file a motion to strike the amended answer or the reply that was filed today by Mr. Blanton in the case.

The Court: Yes, sir; you may do that in order to complete your record; the record should show probably—at least, it is probable, it may not be necessary—the filing of the motion to strike the [amendmended] reply that was filed this morning. That is what you had in mind?

Mr. Watson: Yes, sir. And in view of the fact I am going immediately into the trial of the other case, I will have to have some time.

Mr. Blanton: No objection to that, Your Honor.

The Court: Your brief, Mr. Watson, will be filed on or before the 13th of May, within ten days after the filing [fol. 481] of the other, and in order that you may be able to go on my docket, the final date of submitting the reply brief, if one is filed it can be filed on or before the 20th.

Mr. Blanton: Yes, sir; Your Honor.

Conclusion of the Evidence and Proceedings in this Case.

[fol. 482] United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situated in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, Vera Muschany, Collector of Revenue of St. Charles County, Missouri, St. Charles County, Missouri, Defendants.

Tract No. 24/233

Transcript of Evidence

(Filed March 4, 1943)

Be It Remembered: That during the March Term, A. D. 1942, of the District Court of the United States in and

for the Eastern Division of the Eastern Judicial District of Missouri, the above cause coming on for hearing before Honorable Charles B. Davis, District Judge, Court No. 1, on the 6th and 7th days of April, A. D. 1942, the following proceedings were had:

[fol. 483] Appearances:

For Plaintiff: Harry C. Blanton, Esq. Drake Watson, Esq. Russell Vandivoort, Esq.

For Defendants: William R. Gentry, Esq.

Thereupon, the plaintiff, to sustain the issues in its behalf, introduced and offered the following evidence, to-wit:

Stipulations: Record in Case No. 765 may be considered as Record in Case No. 807, etc.

Mr. Blanton: I think the record might show that by agreement of counsel that the record made in the case that was tried before the three judges, which I believe is number 765, may be considered as the record in this case, subject to all the objections and exceptions and offers of both parties, to be supplemented by such additional testimony as is to be offered by either party in this case.

Mr. Gentry: Well, so far as I am concerned I agree with the spirit of that. I think as to my part I would rather offer the specific exhibits in the proper form and not mix up what comes in rebuttal and what comes in chief. In other words, you offered three or four things [fol. 484] and you rested, and they went into their case.

Mr. Blanton: That is right.

Mr. Gentry: We will offer these similar things, and you go into your case.

Mr. Blanton: That is perfectly agreeable.

[fol. 485] Mr. Gentry: Do you want to give the number of your exhibits?

Mr. Blanton: They were offered the other day. I don't intend to do that. I will offer the exhibits that specifically apply to this.

Mr. Gentry: That is correct.

Mr. Blanton: Yes. In other words, I would like to offer in evidence—

Mr. Gentry: You offered certain exhibits that apply to all. If you would mention them.

Mr. Blanton: I didn't bring those, on the theory the record made the other day would be the record in this case, to be supplemented by these additional records. In everything, of course, except the value of that particular tract.

Mr. Gentry: I have no objection to that. It seems individual, stated in that way.

Mr. Blanton: Otherwise, you would have to offer all the evidence. I don't have the numbers. They were all dictated in the other record. I thought we had an understanding that record would be supplemented by this record where we would offer what additional proof we want to offer, and you would offer what additional proof you want to offer.

[fol. 486] Mr. Gentry: Very well. It is not only subject to objections made by counsel in the first trial—what is the lady's name?—Mertia Callaway case—but where they failed to object to any of the Government's evidence on the ground it is immaterial I might consider that objection is made?

Mr. Blanton: That is perfectly agreeable.

(Evidence for Plaintiff.)

Mr. Blanton: Your Honor, I would like to offer in evidence—which I will ask be marked Government's Exhibit WD-3—

(Said document marked Government's Exhibit WD-3 by reporter as requested)

—which is a certified copy of request of the Secretary of War to the Attorney General for the filing of the condemnation suit involved in this case.

Mr. Gentry: To that we have no objection.

The Court: Let me see that. I would like little better notes on the exhibit as this really is my case. Would you mind telling me the names of the defendants?

Mr. Gentry: James Karl Muschany and Vera Muschany, his wife. I represent those people.

[fol. 487] Summary of Government Exhibit WD-3

This exhibit is a certified copy of the request of the Secretary of War to the Attorney General, dated April 3, 1941, requesting the condemnation of lands described in the declaration of taking, accompanying said letter, including among other lands the lands involved in this suit.

[fol. 488] Government Exhibit AG-3

Mr. Blanton: The second offer we would like to make is Government's Exhibit AG-3, which is the instruction from the Attorney General to myself to file this and other suits.

(Said document marked Government's Exhibit AG-3 by reporter as requested)

Mr. Gentry: There is no objection to that, of course.

Mr. Blanton: Which is dated April 5, 1941.

[fol. 489] Summary of Government Exhibit AG-3

This exhibit is a letter from the Attorney General to the United States Attorney, enclosing the request of the Secretary of War, dated April 3, 1941, (Government exhibit WD-3), the declaration of taking referred to therein, a check for deposit in the registry of the court, and directing the filing of the petition in condemnation involving the lands condemned in this suit, and other lands.

[fol. 490] (Offer of Original Declaration of Taking, Order authorizing Filing of Petition and Order vesting Title, etc.)

Mr. Blanton: We would then like to offer the original Declaration of Taking which is filed in the original file in this case; the Order of the Court authorizing the filing of this petition; the Order vesting title, based on the Declaration of Taking; and all process and returns and other pleadings which have been filed in this case, including the minutes and orders of the Court; in other words, the complete proceedings to date.

Mr. Gentry: I think the Court will take judicial notice of that, but if you want to offer them that is all right.

Mr. Blanton: Adopting the suggestion of Mr. Gentry, that makes our formal offer at this stage of the proceedings.

(Here insert the above mentioned Government's Exhibits)

These documents are not set forth herein for the reason that those pertinent to the decision of the case are set forth in other portions of the record.

[fol. 491] Mr. Gentry: Would Your Honor prefer to take a recess at this time?

The Court: I think we will do that. Announce a recess until two o'clock.

(Recessed at 12:30 P. M., April 6, 1942)

At 2:00 P. M., April 6, 1942, the following further proceedings were had, to-wit:

The Court: You may proceed, Gentlemen.

Mr. Gentry: Mrs. Vera Muschany, will you come forward and be sworn as a witness?

Thereupon, the defendants, through their counsel, to sustain the issues in their behalf, introduced and offered the following evidence, to-wit:

VERA MUSCHANY, a defendant, being duly produced, sworn and examined, testified on behalf of the defendants as follows:

Direct Examination

By Mr. Gentry:

Q. Mrs. Muschany, your given name is Vera, I believe, is it? A. Yes.

Q. You are the wife of Mr. James Karl Muschany?

A. Yes, sir.

[fol. 492] Q. You and he are defendants in this case on trial? A. Yes, sir.

Q. Mrs. Muschany, I will show you a contract which is headed "Option to Purchase Land", and has the number 2826 in very large figures near the top of it, and also the letters and figures W 766 QM, and the name of your husband and your own name as contracting parties therein. Look at this and tell the Court whether that is the original document which you and your husband, James Karl Muschany, signed on the date mentioned there, 29th of November, 1940. Is that correct? A. Yes, sir.

Q. You know your husband's signature? A. Yes, sir.

Q. And that is your signature? A. Yes, sir.

Mr. Gentry: Now let this be marked Defendants'— to avoid confusion I think we better use letters. There will be only a few of them offered. Let this be A.

(Said document marked Defendants' Exhibit A by reporter as requested)

Q. I now show you, Mrs. Muschany, a deed which I will ask the reporter to mark Defendants' Exhibit B.

(Said document marked Defendants' Exhibit B by reporter as requested)

[fol. 493] Q. Look at that deed which is dated the 11th day of January, 1941, and signed James Karl Muschany and Vera Muschany, and tell us whether or not that deed was signed by you and your husband? A. Yes, sir.

Q. And was that acknowledged and left with Mr. Ewald of the Kansas City Title Insurance Company in St. Charles by you and your husband? A. Yes, sir.

Mr. Gentry: Mr. Blanton has seen this deed and has a copy of it. I now offer in evidence the Defendants' Ex-

hibit A, identified by the witness as the option contract; and the Defendants' Exhibit B, identified by the witness as the deed to the land in question.

Mr. Blanton: To which offer we want to make the formal objection, Your Honor, that we don't think they are competent or binding upon the Government for the reasons set out in the Government's reply, without taking time to repeat them.

The Court: Overrule objection.

To which ruling of the Court the plaintiff, by its counsel, then and there at the time duly excepted.

[fol. 494] Defendants' Exhibit A

W 766QM 2826

Option to Purchase Land

Know All Men By These Presents: That the undersigned J. Karl Muschany and Vera Muschany his wife for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Four Thousand Five Hundred Dollars that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

A tract of land situated in U. S. Survey No. 1670, Township 45 North, Range 2 and 3 East and being a part of Lots No. 5 & 6 as designated in the Report of the Commissioners appointed to make partition among the heirs of William Hayes, deceased and more particularly described as follows: Commencing at the northeast corner of said lot No. 5, thence along the Easterly line of said lots Nos. 5 and 6, south 22° 0′ West 28.40 chains, more or less, to the most southern corner of said lot No. 6, thence North 68° West along the southerly line of said Lot 6, 13.14 chains to a point, thence North 22° 0′ East 28.40 chains, more or less, to the northerly line of said Lot No. 5, thence south 68° East along the northerly line of said lot No. 5, 13.40 chains to the place of beginning, containing 33.33 acres more or less.

Also a strip of ground sixteen (16) feet wide, for use by the parties of the second part, their heirs and assigns as a roadway to and from said tract of land hereinabove described off of the Southerly side of said lot No. 6, extending from the westerly line of the tract of land hereinabove described, along the southerly line of the said Lot No. 6, North 68° West approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road running in a northeasterly and southwesterly direction and striking the south line of said lot No. 6 about 10 chains South 68° East from the southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said lot No. 6 a distance of 16 feet therefrom.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as [fol. 495] full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned

will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the [fol. 496] pendency of said condemnation proceedings.

This Option is executed in triplicate at Howell, Mo., this 29th day of November 1940.

J. KARL MUSCHANY,
VERA MUSCHANY

Witness:
J. C. Baker,
Glendon H. Yahn.

Accepted by and on behalf of the United States of America this third day of December, 1940.

R. D. VALLIANT,
R. D. VALLIANT,
Colonel, Q. M. C.,
United States Army.

[fol. 497] Defendants Exhibit B.

This Indenture, Made on the 11th day of January, A. D. One Thousand Nine Hundred and forty-one by and between

James Karl Muschany and Vera Muschany, his wife, of St. Charles County, Missouri, parties of the first part and

United States of America and its Assigns, party of the second part,

Witnesseth: That the said parties of the first part, in consideration of the sum of Four thousand five hundred and no/100 - - - - - - Dollars, to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents Grant, Bargain and Sell, Convey and Confirm unto the said party of the second part and its assigns, the following described lots, tracts or parcels of land, lying, being and situate in the County of St. Charles and State of Missouri, to-wit:

A tract of land situate in U. S. Survey No. 1670, Township 45 North, Range 2 and three (3) East and being a part of Lots No. five and six as designated in the report of the Commissioners appointed to make partition among the heirs of William Hayes, deceased, and more particularly described as follows, to-wit:

Commencing at the Northeast corner of said Lot No. five, thence along the easterly line of said Lots No. 5 and 6, South 22 degrees 0 minutes West 28.40 chains, more or less, to the most Southern corner of said Lot No. 6; thence North 68 degrees West along the southerly line of said Lot No. 6, 13.14 chains to a point, thence North 22 degrees 0 minutes East 28.40 chains more or less, to the northerly line of said Lot No. five, thence south 68 degrees East along the northerly line of said Lot No. five, 13.14 chains to the place of beginning, containing 33.33 acres more or less.

Subject to all existing highway easements.

Also a strip of ground 16 feet wide, for use by the parties of the first part (James Karl Muschany and Vera Muschany, his wife) their heirs and assigns as a roadway to and from said tract of land hereinabove described off

of the southerly side of said Lot No. 6, extending from the westerly line of the tract of land hereinabove described, along the southerly line of the said Lot No. 6, North 68 degrees West, approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road [fol. 498] running in a northeasterly and southwesterly direction and striking the South line of said Lot No. 6 about 10 chains South 68 degrees East from the Southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said Lot No. 6, a distance of 16 feet therefrom.

It is the intention of grantors herein not only to convey all land as described above but also, all land incident thereto claimed by them including accreted land and land occupied by them adversely, if any.

To Have And To Hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining, unto the said party of the second part, and its assigns, forever; the said grantors hereby covenanting that they are lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that they have good right to convey the same; that the said premises are free and clear of any incumbrances done or suffered by them or those under whom they claim, and that they will Warrant And Defend the title of the said premises unto the said party of the second part, and its assigns forever, against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES KARL MUSCHANY,
VERA MUSCHANY.

State of [illegible]souri,
[illegible]unty of St. Charles.—ss.

On this 20th day of February, 1941, before me personally appeared James Karl Muschany and Vera Muschany, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at my office in St. Charles, Mo., the day and year first above written.

My term of office as a notary public will expire December 16, 1944.

ESTELLE J. AMSINGER,
Notary Public.

(Seal)

[fol. 499] Mr. Blanton: May we have an understanding both parties may have exceptions without the necessity of making them, Mr. Gentry?

Mr. Gentry: Yes.

The Court: That will be the understanding.

Cross-Examination.

By Mr. Blanton:

Q. Mrs. Muschany, how long had you and your husband owned this land at the time that option was signed?

A. I don't really know. It was—I don't know.

Q. From whom did you purchase the land?

A. From Mr. Cunningham.

Q. Mr. Walker Cunningham?

A. I believe he and his brother. It was the Cunninghams.

Q. That is, Mr. Walker Cunningham and his wife, and Mr. Samuel Cunningham and his wife?

A. Yes, sir.

Q. I hand you a deed which has been marked Government's Exhibit 807-3, and I will ask you if that—look at it, please—is a copy of a deed dated in 1939?

A. Yes, sir.

Q. Is that about the time you acquired this land?

A. Well, I would say it was.

[fol. 500] Q. Do you remember what you and Mr. Muschany paid for the land?

A. No, sir, I do not.

Q. Was the one thousand dollars set out in this deed the correct consideration, this warranty deed. Government's Exhibit 807-3?

A. I would say that was about it.

Q. Now, Mrs. Muschany, you have heard—were you in court last week?

A. I was here a few days.

Q. Did you hear some testimony here about a mass meeting which was held out at the Howell School on or about November 6, 1940?

A. Yes, sir.

Q. Were you there at that meeting?

A. No, sir.

Q. Was Mr. Muschany?

A. I don't know if he was or not. He might have been for a while.

Q. Was your husband one of the Muschany brothers who operated the business in the town of Howell?

A. Yes, sir.

Q. Under the style of Muschany Brothers?

A. Yes, sir.

Mr. Blanton: I think that is all.

Mr. Gentry: That is all, Mrs. Muschany.

(Witness excused).

[fol. 501] Mr. Gentry: Now, Mr. Blanton, will you please admit at this time to the Court that, pursuant to a subpoena duces tecum issued one day last week, Mr. Ewald, of the Kansas City Title Insurance Company, brought in the following papers: A preliminary report of title, of the Kansas City Title Insurance Company, Certificate of Title, N-1344-238 on Tract 233, it was designated in that. The number has been changed. The land belonging to James Karl Muschany and Vera Muschany, his wife, and that this document which I hand you, and which I am about to have marked, is the document that was brought in by him, and was taken out of the files of the Title Company and loaned to me for the purpose of being offered here?

Mr. Blanton: With the exception, I believe, there are certain pencil marks.

Mr. Gentry: Yes, disregarding pencil changes made.

Mr. Blanton: Yes, I had that understanding with you last week to waive the necessity of Mr. Ewald coming back here.

Mr. Gentry: And to admit they were in his files and brought here under subpoena duces tecum?

Mr. Blanton: Yes, sir, I will make that admission.

Mr. Gentry: Will you also admit that letter dated February 24, 1941, addressed to Honorable Norman W. Littell, Attorney General, Lands Division, Department of Justice, Washington, D. C., which I now hand you, was also in that [fol. 502] file, and brought in as the other was, and if Mr. Ewald were present he would testify he mailed that and the original of the preliminary title certificate to that official?

Mr. Blanton: Yes, I will admit that.

Mr. Gentry: Let these two documents be marked, the certificate Defendants' Exhibit C, and the letter Defendants' Exhibit D.

(Said documents marked Defendants' Exhibits C and D by reporter as requested).

Mr. Gentry: And I offer both of them at this time, and I have an understanding—do you want to make an objection?

Mr. Blanton: To which offer we make the same objection as made to the option and the deed, Your Honor.

The Court: Overrule objection.

Mr. Gentry: And I have an understanding with Mr. Blanton that copies of these two exhibits, which have been made and submitted to me, may be received in lieu of the originals, and we may keep the originals and substitute these copies.

Mr. Blanton: Yes.

Mr. Gentry: The same is true as to the title, is it not?

Mr. Blanton: Yes, Mr. Gentry.

Mr. Gentry: I will leave copies of those exhibits with the reporter.

[fol. 503] Defendants' Exhibit C.

This exhibit is a certificate of title, issued by the Kansas City Title Insurance Company, covering tract 233 (the

land involved in this condemnation case) stating that title was vested in James Karl Muschany and Vera Muschany, his wife, subject to certain exceptions listed in Schedule B.

The original certificate of title is on file with the Clerk of this Court.

[fol. 504] Defendants' Exhibit D.

St. Charles, Missouri

February 24, 1941.

C. H. Ewald

Hon. Norman M. Littell, Attorney General
Lands Division, Department of Justice
Washington, D. C.

Re: Tract No. 233.

Dear Sir:

We are enclosing herewith, in connection with land being acquired by the United States of America for the Weldon Springs ordnance plant, the following documents:

(1) Preliminary certificate of title

(2) Two certified copies of warranty deed

(3) Voucher form No. 1034 in quadruplicate

(4) Photostatic copy of option

(5) Sketch of land in question

If there is anything further required in connection with this transaction, kindly let us know and we will furnish it.

Very truly yours,

CHE/HAB
Encl

106 South Main Street
St. Charles, Missouri

[fol. 505] Mr. Gentry: Now that is all of the testimony I will offer in my case in chief, but owing to the fact that Mr. Kerth, who is a witness for us as to the value of lands and who in the ordinary course of events would not be put on until we come to our rebuttal, is engaged in Govern-

ment activities as to how much sugar he will issue to us so we don't get too much in our coffee or breakfast food, Mr. Blanton consented that he may be put on out of turn. And may that be done without prejudice to us because we are offering it out of turn?

Mr. Blanton: Oh, yes, Mr. Gentry.

Mr. Gentry: Mr. Kerth, will you come forward, please?

(Testimony of Defendants in Rebuttal, by Agreement of Counsel.)

Thereupon, by agreement of counsel, the defendants', through their counsel, introduced and offered, out of turn, rebuttal testimony as follows:

[fol. 506] H. P. Kerth, a witness of lawful age, who was duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:

Q. Mr. Kerth, please tell the Court your name.

A. H. P. Kerth.

Q. Where do you reside? A. Clayton.

Q. How long have you lived in St. Louis County?

A. All my life.

Q. Were you formerly connected with the St. Louis County Bank there at the corner— A. Yes, sir.

Q. —of Meramec and Forsyth Avenue in Clayton?

A. Yes, I was.

Q. How long were you connected with the bank?

A. Twelve years at that bank.

Q. What were your particular duties in connection with the bank at that time?

A. Making loans, real estate loans and loaning money.

Q. What did you have to do with the appraisement of land tracts and who did you advise with in determining whether a loan should be granted or refused?

A. I had all to do with that.

Q. Did that work of yours extend all over St. Louis County?

[fol. 507] A. Yes, sir.

Q. Have you had occasion to make appraisals in St. Charles County? A. No, sir, I have not.

Q. Are you familiar with Missouri Bottom values just on this side of the River in St. Louis County?

A. Yes, sir.

Q. Near the City of St. Charles?

A. I am running a bank out there on the Bottom now.

Q. What did you say?

A. I am in the Chesterfield Bank.

Q. Do you have the same duties with that bank?

A. Yes, I do.

Q. Are you familiar with the values of Missouri River bottom lands in the neighborhood of St. Charles and Chesterfield, on both sides of the River? A. Yes, sir.

Q. I will ask you whether, at the request of Mr. Karl Muschany, you went with him down into the Missouri River bottoms the other side of the little town of Hamburg and within this area known as the Weldon Spring TNT Plant Project, and looked over the tract of 33⅓ acres of land which is involved in this suit?

A. Yes, sir, I did. I went down with Mr. James Muschany.

Q. Do you know when you went there?

A. Sometime in August, 1940-1941.

[fol. 508] Q. August, 1941? A. Yes, sir.

Q. Did you look over it to see what crop it was bearing?

A. Yes.

Q. What was it in when you were there?

A. Alfalfa.

Q. Can you tell the Court the nature and appearance of that alfalfa crop? A. Very fertile soil.

Q. You judged that from the appearance of the crop?

A. Yes.

Q. What further examination did you make of the property there?

A. I looked all over it. I know quite a bit about that bottom because I have been operating in that for the last thirty-five years, and they have just a little better soil than they have on this side of the River.

Q. Did you form an opinion, from your knowledge of the territory there, as to the fair and reasonable market value of that 33⅓-acre tract as it was in November and

December, 1940, without any reference to the fact a TNT project was located there; just taking it as an agricultural property?

A. I looked over it and found it was what we call three-crop land.

Q. By that what do you mean?

A. Three crops in one year.

Q. What were they?

A. Anything you put in. You could start with spinach, [fol. 509] follow with carrots or potatoes, and in the fall turnips.

Q. If it is in alfalfa what about it?

A. It will make four or five crops of that.

Q. What, in your opinion, was the fair and reasonable market value of that tract of land there in November and December, 1940?

A. I would say it is worth $150.00 an acre between brothers.

Mr. Gentry: You may examine.

Cross-Examination.

By Mr. Blanton:

Q. What was that last answer, Mr. Kerth? You say $150.00 per acre, what?

A. Between Brothers.

Q. Between brothers? A. Yes.

Q. What do you mean by that?

A. I mean a brother wouldn't be beat by paying $150.00 for it.

Q. Now, Mr. Kerth, you say there was an alfalfa crop on the farm when you were out there?

A. Yes, sir.

Q. Do you know how long alfalfa had been growing on that farm, that particular crop? A. No, I do not.

Q. What is the effect on alfalfa if it is overflowed and remains under water?

[fol. 510] A. If it stays on too long it will kill it.

Q. How long would it have to stay on to kill it?

A. Well, if it stays on a week or ten days.

Q. That likewise is true of these other crops which you mentioned, turnips, spinach, soybeans?

A. Yes, but the beauty of that is you could sow a crop right back of it.

Q. Any of those crops you mean, if the water stays on too long it will kill it?

A. But very seldom it does that.

Q. Have you kept any record of how often that St. Charles County river bottom land overflows?

A. St. Charles County, I don't know anything about the overflow. On this side of the River I know every foot of it.

Q. This land is on the St. Charles County side?

A. Yes.

Q. I will ask if you noticed runways on that land where the engineers would go from the high land to the well?

A. Yes, I saw that.

Q. How high above the ground are those runways or catwalks or whatever you want to call them?

A. I guess six or seven feet.

Q. They are tall enough for an automobile to drive under, aren't they?

[fol. 511] A. Yes. I guess seven foot would clear an automobile, wouldn't it?

Q. How widespread were those walks all over that land there?

A. Well, I never inspected that at all. Just going by I noticed there were walks there.

Q. Did that land overflow last year?

A. I do not know that.

Q. You didn't find any fish in a pocket on the land, left by overflow, when you were on there last August?

A. No.

Mr. Blanton: That is all.

Mr. Gentry: That is all. May Mr. Kerth be excused?

Q. One more question: You didn't find any improvements on this property?

A. Outside of the crop.

Q. No buildings?

A. No buildings that I saw.

Q. When you were there how much of the land was in willows or other timber?

A. There were some there but I couldn't tell you exactly.

Q. What percentage of the 33-acre tract was in willow trees or timber?

A. I guess six or eight acres. I don't just know.

Mr. Blanton: That is all.

Mr. Gentry: May he be excused?

Mr. Blanton: Yes. (Witness H. P. Kerth excused)

[fol. 512] (Further Testimony for Plaintiff.)

Thereupon, the plaintiff, through its counsel, continued to introduce and offer on its behalf further evidence as follows, to-wit:

James Karl Muschany, a defendant, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Muschany, you are the Karl Muschany who is the defendant in this case, are you not?

A. That is right; yes, sir.

Q. That was your wife who was just upon the witness stand and who was the joint purchaser of this property with you? A. Yes, sir.

Q. She knew nothing about the details of the purchase when you made the purchase of this land in controversy from the Cunninghams in 1939, I take it?

A. Very little, if any.

Q. The consideration set forth in this conveyance, copy of deed, Government's Exhibit 807-3, is correct, is it not?

A. Whereabouts is that consideration?

Q. One thousand dollars?

A. I say, whereabouts is it? I see. Well, approximately. [fol. 513] I was probably to other expense. I think I had an attorney look up the abstract and inspect it, and a few small things, but that is about the money I was out I suppose. Something over that, probably one hundred dollars would catch it. I don't remember.

Q. This 33-acre tract isn't on a public road, at all, is it?

A. Well, it is the same thing as on a public road because I owned a road from it to a public road.

Q. I know. In addition to the 33 acres you bought from the Cunninghams, you also bought a sixteen-foot right-of-way across 66 acres, from the 33 acres you bought to the public road?

A. It is along a division line which happened to be at that time a thicket and grew in trees and brush. It isn't across their farm.

Q. Look at the deed.

A. I don't have to look at the deed. I remember where the road is.

Q. It was across that other land?

A. As I stated, it was along a division line between them and a neighbor, which was a thicket.

Q. Whether it was a thicket, it was on their land?

A. Yes.

Q. So for one thousand dollars you got not only 33 acres [fol. 514] but this right-of-way across 66 acre tract which was divided at the time this 33 acres was set off to you?

A. I don't think it went the entire distance of both those tracts, but a portion of it though.

Q. Now, Mr. Muschany, were you out at this Howell School House mass meeting or on about November 6, 1940?

A. Now, they had several. I think I know which one you refer to.

Q. The one that Senator Williams was at, and the one where McDowell attended and was asked a lot of questions and where the testimony shows eight hundred to one thousand people attended?

Mr. Gentry: Where Ford Thompson made a speech, is that the same one?

Mr. Blanton: Yes.

A. I was at a portion of that meeting.

Q. What other meetings did you attend out there?

A. Well, it seems to me they had two or three, but I don't remember. I think I was at one of those.

Q. What was discussed at those other meetings?

A. I believe our representative addressed one of those meetings, and I think I was present at that meeting.

Q. You say a representative. Who addressed the meeting?

A. This representative, the Honorable Clarence Cannon.
[fol. 515] Q. Your representative in Congress?
A. That is right.
Q. Was Mr. McDowell there at that meeting?
A. I don't know.
Q. Well, you know Mr. McDowell, don't you?
A. I know him when I see him.
Q. Did he make any statements at that meeting?
A. I don't think he did. I don't remember. Those meetings have been a year or so ago. I don't remember all about them.
Q. Are you one of the Muschany Brothers who owned a business there at Howell, where you sold your business and were allowed about $6,500.00 for loss of profits on your store business?

Mr. Gentry: To that we object because it is immaterial to any issue in this case.

The Court: Sustain the objection to the latter part of the question.

A. I am one.

The Court: "Are you one of the men who were allowed about so and so for profits" that part may come out.

Mr. Blanton: We offer to show by this witness that he was one of the Muschany Brothers and he was in this contract option in which he sold his business there in Howell and was allowed by McDowell the sum of $6,500.00.

[fol. 516] Mr. Gentry: We renew our objection.

Mr. Blanton: As lost profits on his business.

Mr. Gentry: We renew objection, because that is immaterial. We will try that later on, we will try that case.

The Court: Sustain objection to the latter part of the offer.

Mr. Blanton: To which we except.

The Court: Will you find out where the witness lives? I don't know where he resides.

Cross-Examination.

By Mr. Gentry:

Q. Where do you reside, Mr. Muschany? I forgot to ask you.

A. I live at Chesterfield, Missouri.

Q. That is this side of the River, of course?

A. Yes.

Q. And near that relief highway, new Highway 40--they call it 61, I believe?

A. Yes, sir. I live near Chesterfield. It is on the Express Highway.

Q. You were asked in regard to the figures in that deed, about one thousand dollars. You knew the owners of that land, didn't you, the two Cunningham brothers?

A. Yes, sir.

Q. They were old gentlemen who owned that farm a [fol. 517] good while, had they?

A. I am not prepared to say, but I think most of their lives. Whether they inherited it or purchased it I don't know. They inherited it, I think.

Q. It was a tract made up altogether of something over ninety acres, near one hundred acres? A. I think so.

Q. That was split into three parts and you got 33⅓ acres next to the River, did you not? A. Yes, sir.

Q. At the time you acquired that property was there any roadway, just before you bought it, was there any roadway leading from the pubiic road into this 33-acre tract? A. No public road to it, no, sir.

Q. You bought a sixteen-foot strip for the purpose of having a road? A. Yes, sir.

Q. When you bought that land what occupied the sixteen-foot strip? Was there a road already developed or what was it? A. No, sir, it was not.

Q. What was it?

A. It was a thicket, commonly known in the country, along the fence. I don't remember the width exactly, but there is where I got the roadway. I could have traveled over their land possibly, but if they ever sold it I needed that land to get to my land.

[fol. 518] Q. As to that sixteen-foot strip, was it in such shape when you bought the land you could drive an automobile through, or a truck, to haul things to your place?

A. No, sir.

Q. What was done later before you sold the property, contracted to sell it to the Government?

A. The construction company wanted to pave the river bank along my land; they were to bring in some rock by boat and wanted to haul some of it over my land, to get to the river. They came to see me about it, and I said, "If you prepare that road to the river you can travel over my land," so they cleared the thicket out, and in due course of time they hauled the rock to pave the river.

Q. When you sold the land was it in such shape anyone could drive from that highway over your land?

A. Yes, sir. I traveled it myself.

Q. In an automobile? A. Yes, sir.

Q. When you purchased the land what was there, if anything, on the north end? I may have the direction wrong. The end farthest from the road.

A. Do you mean in crops?

Q. Was there a lot of willows at the far end of that land?

A. No, sir. If I have my direction correctly. There are a few willows in the south end next to the river. The part of the levee that was unpaved.

[fol. 519] Q. How much land in willows or trees of any kind, without cultivation, when you bought the land?

A. I will have to refresh my memory with facts. I have them down in cultivation. It would be easier for me to tell what was in cultivation and how many I cultivated.

Q. Tell us what was cultivated when you bought it.

A. We estimated twelve acres in wheat, which was put in alfalfa, and twelve or thirteen in corn, and I caused to be cleared three or four more acres.

Q. That made about twenty-nine acres, after you had done this clearing, in cultivation?

A. Probably thirty. I never had the land measured, but among all of us we think that is about the amount; in fact, we are positive.

Q. Some of it was left in brush?

A. After I cleared it.

Q. Sir?

A. After I cleared it there was, I judge, three and one-half acres, I don't know.

Q. Something like three and one-half acres left in brush after you did the clearing? A. Yes, sir.

Q. Did you see a crop or crops there in 1939 and 1940?

A. Yes, sir.

Q. What were those crops and what was the nature of them?

[fol. 520] A. When I bought the land the wheat had been cut off. I think it was September when I purchased it.

Q. 1939? A. I think that is right.

Mr. Gentry: The deed will show what it was.

Mr. Blanton: 28th of September.

Mr. Gentry: 28th day of September, 1939.

Q. The wheat had been cut off, of course?

A. And the rest was in corn.

Q. That year did you observe what sort of corn crop there was there?

A. A good crop of corn.

Q. What about the size of the ears?

A. Well, they were, naturally, large. We owned the store there, I gathered a few and exhibited them proudly. Some of the farmers matched them and some didn't, but it was good corn.

Q. When was it you put in the alfalfa?

A. The next year we sowed that portion in wheat; that fall we cut the cockle-burs off, and sowed it in alfalfa the following spring.

Q. What crop did it produce in the year 1940?

A. I think four crops. The first which wasn't very good, which I am told never is with alfalfa, and there were three more. I am not positive, I think it was three.

Q. You think three all told or three after the first? [fol. 521] Which do you mean?

A. It was three or four. I wouldn't want to make a positive statement but it was three or four.

Q. Are you familiar with the crop of alfalfa you were raising out there in the county? A. Yes, sir.

Q. You have seen crops of alfalfa in many different farms around over the country? A. Yes, sir.

Q. How did this alfalfa on this bottom land you bought compare to the alfalfa you saw generally?

A. Well, it was as fine as any I have ever seen. When we appraised the land that alfalfa was waist high, the latter part of August or the first of September, as Mr. Kerth testified. I don't remember the exact date, but it was waist high, because I walked out into it.

Q. Do you know the nature of the soil, sand, loam or clay, on your farm?

A. I am not an expert on soil but I think it would be termed sandy loam. It wasn't a black stick land. You could cultivate it and it would dry out quick, and I think it would be termed a sandy loam.

Q. Last fall, in September or October, do you remember we had a very long, protracted spell of rainy weather?

A. Yes.

Q. Did you go down there onto that land—

[fol. 522] A. Down there onto that land?

Q. —during or after that rainy spell, or not?

A. Not afterwards. I didn's have access to that land.

Q. It was fenced over?

A. Long before that we had to get a special permit from Colonel Dutton to go there and pass that land in August.

Q. Was it fenced off at that time?

A. That is policed, it is guarded; you can't visit it, but whether there is a high fence along Highway 61 I don't know.

Q. Was the area guarded so you couldn't go through without permission at that time?

A. Very much so.

Q. Do you remember when the Government took possession of your farm and guarded the road so you couldn't get in?

A. Well, I think they guarded the whole area about the same time. There is testimony—

Q. About when was that?

A. I heard Colonel Dutton testify the other day about that, but I don't remember the date, it has been so long ago.

Q. According to your acknowledgment on the 20th of February, it was dated the 11th of January. Could you tell us with reference to either of those dates whether it was shortly after either of them, or when it was?

A. I think so. I didn't get any crop, I didn't gather [fol. 523] the alfalfa, so it was along in the spring.

Q. These condemnation suits, I believe, were commenced in May, weren't they?

Mr. Blanton: They were commenced at various times, but somewhere along about that time, Mr. Gentry. However, I think for the sake of the record we are willing to admit, at least theoretically, the Government took possession along in the fall at the time you fixed the value, along in November or December, 1940.

Mr. Gentry: And condemnation suits were not brought until May?

Mr. Blanton: Well, four or five months later.

Q. I think the deed you referred to shows you paid one thousand dollars. How was that made up? What was the nature of your negotiations about that? Tell the Court.

A. How I happened to acquire it?

Q. How you happened to get it, and what the terms were, and circumstances.

A. I heard about this tract of land, and the taxes were considerable, and I had owned other bottom land, and I desired it, and a friend of mine told me about it, and I negotiated for it, and the back taxes on that land, I think, were $801.00, or $800.00. I don't know whether it was $801.00 or $800.00. Anyway, it was about that amount. I felt it was a great bargain, and instead of offering these men, [fol. 524] if it came to a tax sale, I did pay $800.00 and gave them $100.00 besides.

Q. Making $1,000.00? A. Making $1,000.00.

Q. Had they made any statement to you about not paying the taxes?

A. I don't know, but I knew they were unpaid.

Q. You paid them $100.00? A. Yes, sir.

Q. And did you pay the taxes?

A. Yes, sir. I have the receipts.

Q. And cleared up all of the taxes amounting to about $800.00 or more; is that right? A. That is correct.

Q. When you bought it was there any process by the United States Government in what we sometimes call rip-rap or pilaster along the river banks?

A. There wasn't any process, but it had been paved years before and was hidden in the dirt. On a portion down farther it was not.

Q. While you owned it and before you contracted to sell it was any more rip-rap work done?

A. They completed it on my land; that is why they wanted the rock down there.

Q. Did you have any assessments to pay on account of that, and did you pay any assessments while you owned the land, on account of that rip-rapping?

A. This land is in the—I don't know whether I can get [fol. 525] the name correct—Darst Drainage Association, District No. 2, I believe. We pay so much a year, and I am informed a portion of that money went for that purpose.

Mr. Blanton: Unless the witness knows of his own knowledge, we object to his testimony.

The Court: Sustained.

Mr. Gentry: Of course, that may be stricken out.

A. I don't see what that money could be for if it was for the land.

Q. Don't speculate. Did you pay any kind of assessment besides taxes on that land up to the time you sold it? A. Yes, sir.

Mr. Blanton: Tax receipts and to whom he paid it are the best evidence.

Mr. Gentry: I don't think so, if he knows the person to whom he paid it.

Mr. Blanton: We are objecting to that kind of testimony.

The Court: Do you have receipts on it?

A. Yes, sir.

Q. All right, pull them out.

The Court: Objection sustained.

A. It will take just a moment but they are here. Here is the year paid, October 10, 1940. I might add, they were the same each year, if permitted.

[fol. 526] Mr. Gentry: Very well. Wait a minute. It is a drainage district organized under the laws of Missouri.

Q. The paper you have handed me is headed Darst Bottoms Drainage and Protection District Number Two, Receipt No. 58 C, James Karl Muschany and wife, is it not? You see it is so headed? A. Yes, sir.

Q. All right, and the amount stated in there as the sum paid, total tax, was $45.58? That is what you paid that year? A. Yes, sir.

Q. Is that the purpose? A. Yes, sir.

Mr. Gentry: Let this be marked Defendant's Exhibit.

A. I might add—

Mr. Gentry: Wait a minute. He is writing down the exhibit; you can't add anything. You might add it later.

(Said receipt marked Defendants' Exhibit E by reporter as requested)

Q. Now, Mr. Muschany, there weren't any houses on that place at all? A. No, sir.

Q. And you had a tenant living on there—what was his name? Not living on there but cultivating it, living elsewhere and cultivating the farm?

A. Mr. Arch Howell.

Q. Mr. Arch Howell. I believe that is all.

Mr. Blanton: That is all.

(Witness James Karl Muschany excused)

[fol. 527] (United States Exhibits)

Mr. Blanton: We would now like to offer, Your Honor, Government's Exhibit 807-1, which is a certified copy of letter from R. Newton McDowell to Colonel R. D. Valliant, dated November 29, 1940.

Mr. Gentry: No objection.

Mr. Blanton: Recommending the approval and acceptance of this option set in this case at $4,500.00, in which Mr. McDowell states, "I recommend its acceptance as a fair value to the United States Government. Yours very truly, R. Newton McDowell," referring to the land by description set forth.

[fol. 528] 2826

R. Newton McDowell
Home Office
Midland Building
Kansas City, Missouri

Land Optioner for
United States War
Department

Telephone 1091
126 South Main
St. Charles, Missouri

November 29, 1940.

Col. R. D. Valliant,
Real Estate Branch,
Office of Quartermaster General,
War Department,
Washington, D. C.

Dear Sir:

I submit herewith option of J. Karl Muschany and Vera Muschany, his wife, for approximately 33 acres of Missouri River Bottom land in Township 45, Ranges 2 and 3 East, U. S. Survey 1670, for $4,500.00.

I recommend its acceptance as a fair value to the United States Government.

Yours very truly,

(s) R. NEWTON McDOWELL,
R. NEWTON McDOWELL.

RNMcD/MW

[fol. 529] (Government Exhibit 807-3.)

Mr. Blanton: We would like to offer, Your Honor, certified copy of the deed, being Government's Exhibit 807-3, from the Cunninghams to Mr. and Mrs. Muschany, dated September 28, 1939, which is as follows:

Describes the property involved herein by meets and bounds and then adds:

"Also a strip of ground sixteen (16) feet wide, for use by the parties of the second part, their heirs and assigns, as a roadway to and from said tract of land hereinabove described, off of the Southerly side of said Lot No. 6 ex-

tending from the Westerly line of the tract of land hereinabove described along the Southerly line of the said Lot No. 6 North 68° West approximately 16.50 chs. to the center line (or a Northerly extension thereof) of a certain public road running in a Northeasterly and Southwesterly direction and striking the South line of said Lot No. 6 about 10 chs. South 68° East from the Southwestern corner of the said Lot No. 6, the said Northerly line of said strip of ground 16 feet wide running parallel with said South line of the said Lot No. 6 a distance of 16 feet therefrom."

And Shows consideration of one thousand dollars. The revenue stamp, $1.00, attached thereto. It is a warranty [fol. 530] deed executed by Walker Cunningham, Eliza Cunningham, Samuel Cunningham and Anna K. Cunningham; acknowledged by Charles J. Daudt, Notary Public, on the 28th of September, 1939, and recorded in the Recorder's office, book 194, page 13, on the 28th of September, 1939.

[fol. 531] Summary of Government Exhibit 807-3

This exhibit is a general warranty deed, dated September 28, 1939, executed by Walker Cunningham, et al, to James Karl Muschany and Vera Muschany to the land condemned in this suit, conveying not only the fee to the land condemned in this suit but an easement in the 16 foot strip of land across other lands owned by the grantors in said deed, giving the grantees, James Karl Muschany and Vera Muschany means of ingress and egress to the land condemned herein; in the usual form, setting forth the consideration of $1,000 with a one dollar ($1.00) Internal Revenue documentary stamp attached and cancelled, duly acknowledged before a notary public on September 28, 1939, and recorded in the office of the Recorder of Deeds of St. Charles County, Missouri, on September 28, 1939 in Book 194 at page 13 of the deed records of said county.

[fol. 532] (Government Exhibit 1, Aerial Map made in 1937.)

Mr. Blanton: I think it might be a little helpful, Mr. Gentry, if we would offer these two plats for the infor-

mation of the Court. One of them is Government's Exhibit—this will be Government's Exhibit 1.

(Document marked Government's Exhibit 1 by reporter as requested).

This, Your Honor, is Government's Exhibit 1, which is the map made from the air in 1937. On August 13, 1937. That was prior to the purchase of this land. Since that time, I think we all agreed, Mr. Muschany cleared up some of this timber shown on this map.

Mr. Gentry: That was over two years before he bought it.

Mr. Blanton: Here was the original one hundred acres of the Cunningham tract, these three. Here is the Missouri River. Here is the parcel involved, right here. This is the Darst river drainage bottom land between the river and the one hundred-acre tract, most of which has been washed away. This was the first case we had on the docket. Here is the public road which comes down here. Right up here is where that sixteen-foot right-of-way is. I am correct about that, am I not, Mr. Gentry?

Mr. Gentry: I think so. It was across one of these two pieces.

[fol. 533] Mr. Blanton: Here is where the road comes.

Mr. Gentry: I think you are right. That is what was in the thicket he had cleared up by the men that wanted to haul there. This dark, showing the willows two years before he bought, has been cleared up.

Mr. Blanton: I believe, for the record, this is designated tract 16 in the Government's Exhibit 1.

The Court: Is that the MK & T Railroad?

Mr. Gentry: This is a creek down here.

Mr. Blanton: I think that is correct.

[fol. 534] (Testimony for Plaintiff.)

F. H. Schreiner, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Schreiner, state your name to the Court, please.

A. F. H. Shreiner.

Q. Where do you live?

A. St. Louis.

Q. By whom are you employed?

A. Farm Credit Administration, Federal Land Bank.

Q. In what capacity are you employed?

A. I am Senior Engineer Appraiser.

Q. Do you have a photostatic copy of the coastal and geodetic survey of the map showing—

A. No, sir, not coast and geodetic. It is a photostatic copy of the map made by the United States Engineer's office.

Q. Does that show the elevation of this parcel of land?

A. Yes, sir.

Q. What do the contour lines on these photostatic maps which you have produced here—how frequently are those contour lines shown?

A. At two-foot intervals.

Q. At two-foot intervals. Will you mark on this exhibit, which I will ask be marked Government's Exhibit 2—

[fol. 535] (Said map marked Government's Exhibit 2 by reporter as requested).

Q. Have you indicated on Government's Exhibit 2 the 33⅓ acre tract known as the Karl Muschany tract?

A. Yes, sir.

Q. Where is it indicated?

A. It is within these red lines. They are rather faint.

Q. You have it numbered 1670?

A. No. That is the survey number. It is shown by this red line.

Q. In other words, it is up—it is the red rectangle up in the right-hand corner appearing on Government's Exhibit 2?

A. That is right.

Mr. Blanton: Here it is, Mr. Gentry.

Q. Now, what elevation above—strike that out. These contour lines, do they indicate mean gulf level?

A. Yes, sir.

Q. What elevation above mean gulf level is shown on this map to be the elevation of this Muschany tract?

A. The highest contour shown is 458. 460 is not shown, therefore the elevation is somewhere between the two.

Q. Between 458 and 460. What proportion of that 33⅓ acre tract is above the 458 elevation and below the 460?

A. It looks like it is approximately half. Perhaps a little more.

[fol. 536] Q. How high is the lowest land on that tract?

A. The lowest contour is 452.

Q. Approximately what portion of the land is between 452 and 454?

A. It looks like about 8 or 10 acres.

Q. And how much of it is between 454 and 456?

A. Very little. 454 and 456 are on the rise.

Q. How much is there between 456 and 458?

A. I should judge about 5 acres by the looks of it.

Q. Now, have you made a study of the Government records showing the flood stages of the Missouri River, from the Government records, Mr. Schreiner?

A. Yes, sir, I have. From the Weather Bureau records.

Q. Where are the two gauges, of which records are regularly kept, closest to this point on the River?

A. This farm lies between the St. Charles and the Hermann gauges.

Q. How does the Government Engineer's office keep the records showing the different distances on the River, from the mouth of the Missouri River?

A. I do not understand your question.

Q. Do you have what you call mile-posts or mile-gauges?

A. Yes, sir. The River is measured and the mileage is shown on the maps.

Q. What mileage is shown on the map at Hermann, for instance?

[fol. 537] A. The Hermann gauge, according to the Weather Bureau record, is mile 99.

Mr. Gentry: Is what?

A. 99.

Q. What is the record at St. Charles?

A. 28. Mile 28.

Q. What is the record opposite this Muschany land?

A. Approximately mile 48.

Q. Now, have you a record showing the various occasions—strike that out. When did the Government first start keeping records of the flood stage of the Missouri River?

A. Why, different gauges have different times. I have the records at St. Charles for 61 years.

Q. Have you also examined the records for Hermann?

A. Yes, sir.

Q. Have you approximated the spread between Hermann and St. Charles so you know approximately what the River stage is there at mile 48 which is opposite the Muschany land?

A. Yes, sir, I made a computation.

Q. Upon what did you base that computation?

A. Well, it is the slope between the two—of the water between the two stations.

Q. Now, Mr. Schreiner, what is the flood stage of the Missouri River at St. Charles?

A_4 25 feet.

[fol. 538] Q. I will ask you what your records show the number of times or the number of years since 1881 the Missouri River has exceeded the flood stage there at St. Charles?

Mr. Gentry: I object to it at St. Charles. I don't see that that makes any difference.

Mr. Blanton: I will lay that as the foundation and back up to the other place, Mr. Gentry.

The Court: Overrule the objection.

Q. Beginning with 1881?

A. The flood stage at St. Charles has been equaled or exceeded 47 times.

Q. That is an average?

A. 1.3 per year.

Mr. Gentry: What?

A. 1.3.

Q. In other words, a flood stage every one and three-tenths years? Do I understand you correctly?

A. Yes, sir.

Q. What do the records show as to the time of year in which these flood stages predominate on the River there?

A. Well, they generally do in the spring months. Early summer.

Mr. Gentry: Spring or December?

A. Early summer.

Mr. Gentry: Early summer.

Q. I will ask you if during any of these years it exceed-
[fol. 539] ed the flood stage more than once per year?

A. Yes, sir.

Q. I call your particular attention to the years 1915 and 1927 and 1929 and 1941, and will ask you to state what the records show.

A. In 1915 the flood stage at St. Charles was exceeded three times, June 3rd, June 25th and July 22nd. That is the crest.

Q. What about 1927?

A. 1927, it exceeded it five times.

Q. What were the dates of that?

A. The crest at St. Charles was April 5th, April 25th, May 10th, and June 7th and June 25th.

Q. Now, 1929?

A. In 1929 six times.

Q. What were the dates?

A. The dates of the crest at St. Charles, March 17th, April 11th, April 26th, May 19th, June 9th and June 27th.

Q. Now, in 1941 how many times did it exceed the flood stage?

A. Four times.

Q. What are the dates?

A. April 23rd, June 19th, October 7th, November 6th.

Q. Now, does your record show the duration of these flood stages?

A. Yes, sir. At St. Charles the flood—the days of flooding, the average days of flooding per occurrence was 9.7 days, or 7.6 per year.

[fol. 540] Q. And what was the greatest duration on any of those flood stages?

A. I think it was 1903. It will give it to you in a minute.

Q. Let's come back—

A. 35.4.

Q. Now, I will ask you to look at your record for the year 1935, and tell us how many days during the year 1935 the River was above flood stage?

A. 40 days.

Q. And in the year 1941 how many days was it above flood stage?

A. Well, one flood was 16 days, another 13 days, another 8 days, and another 8 days. That makes 42 days, I think.

Q. Now, on the basis of your computation, Mr. Schreiner, taking into consideration the River stage at both Hermann and at St. Charles as shown by these Government records, have you made any figures for the flood stage on the Muschany farm at mile 48?

A. Yes, sir. I have based it on mile 48, yes, sir.

Q. And with respect to the Muschany tract where is mile 48, according to your computation?

A. Well, 48 is approximately opposite the Muschany place.

Q. Now I will ask you to tell us from your computation how many times during the past sixty years that portion of the land which lies above 458 feet level has been flooded?

Mr. Gentry: I object to that, if the Court please. That [fol. 541] would be largely guesswork on the part of this witness. We all know at some places the River backs higher than at other places. It might overflow at a certain number of feet above sea level and might flood between, and at another place owing to the height of the bank it might be left perfectly dry, while the place above or below is flooded. For him to undertake that is only subject to a guess.

Mr. Blanton: Yes, but water finds its level.

Mr. Gentry: You don't know.

The Court: Overrule objection.

Q. The Court says you may anwser, Mr. Schreiner. Will you?

A. Will you state your question again?

Mr. Blanton: Read the question, will you, please, Mr. Quinn?

(Last question repeated by the reporter).

A. Above 458 feet. I would say at 458, because some of it is higher than that.

Q. All right.

A. 458 feet has flooded 32 times in 61 years.

Mr. Gentry: What is that? I didn't hear it.

A. 32 times in 61 years, according to my computation.

Q. How often has the land which lies between—456 feet level?

A. About 47 times.

Q. How about that 454-foot level?

A. I don't have that.

[fol. 542] Q. Now, according to your records, was that land flooded in 1941?

A. At what elevation?

Q. At any elevation, any of that land, and I will ask you to break it down.

A. Yes; it was flooded at 458, it was all flooded.

Mr. Gentry: Raise your voice just a little, please, sir. It is very hard to hear.

A. Elevation of 458 was flooded in '41.

Q. Over what period of time?

A. Well, it was flooded about 30 days.

Q. And what time of the year?

A. That was in October and November.

Q. Now, of course, if that amount of it was flooded for that long, how much longer a period of time was the land lower than 458 feet level flooded during the year 1941?

A. Of course, that depends upon how low you are going down.

Q. Well, as low as this land goes down?

A. See, I don't have this below the St. Charles, computed on St. Charles flood stage. I don't know what is below that.

Q. I see. Now, in 1903, I believe, your records indicate the crest at mile 48 reached 462.8 feet; is that correct?

A. At which mile? 58?

Q. Mile 48. That would be this tract, opposite this tract.

[fol. 543] Mr. Gentry: 1903, you say?

Mr. Blanton: 1903.

A. About 466.3 feet.

Q. That would flood this entire farm to a depth of how much?

A. Well, that would flood it just about 8 feet.

Q. Now, there was another high flood in 1935, I believe, according to the records; is that right?

A. Yes, sir.

Q. Now, how deep did this flood in 1935 get over the entire farm, at the highest portion of the farm which would be below 460?

A. That was 465 feet.

Q. It would be at least 5 feet deep over the entire farm?

A. Yes, sir.

Q. And in 1927, what does your record show how deep or how high the flood was? What was the flood stage at mile 48?

A. There were several floods in 1927. I suppose you want the deepest one?

Q. That is right.

A. 464 feet.

Q. So it would be at least 4 feet deep over the highest portion of the land?

A. Yes, sir.

Q. I think that is all. I do want to ask you one more question, Mr. Schreiner: I notice on this map here you have certain colored inks. I notice you have purple ink, and blue ink, apparently showing—do those indicate chan-

[fol. 544] nels, former channels of the river?

A. Yes, sir. Do you want me to give the—

Q. Yes, I wish you would. Just what they do indicate.

A. The blue color represents the 1926 river channel.

Mr. Gentry: The 1926 what?

A. 1926 river channel. The red represents the 1922 river channel. The purple represents 1890 river channel, and the orange represents the 1878 river channel.

Q. In other words, there has been a good deal of shifting of the river channel at that particular point; is that correct?

A. Yes, sir.

Q. This particular land itself is right in what was formerly the river channel, is it not, Mr. Schreiner?

A. Yes, sir.

Q. What do you mean—for the sake of the record, by flood stage of the river, Mr. Schreiner?

A. Well, flood stage is determined by the Weather Bureau and it has reference to the stage of the flood when the water generally gets out over the majority of the low land in the valley. That does not necessarily mean all of the land.

Mr. Blanton: We would like to offer two exhibits, these two exhibits which have been identified as Government's Exhibits 1 and 2.

(Here insert Government's Exhibits 1 and 2)

United States Exhibits 1 and 2 are an aerial map and a survey map of the particular plat, the originals of which are on file in the office of the Clerk of the Circuit Court of Appeals.

[fol. 545] Cross Examination.

By Mr. Gentry:

Q. Mr. Schreiner, of course, you had no personal knowledge of this land or its condition back in 1881, had you?

A. I have not.

Q. Nor at any time since then?

A. No, sir.

Q. You haven't any knowledge from going out and looking at it?

A. No, sir.

Q. You haven't examined the land at all?

A. I haven't seen the land.

Q. So the figures you gave us are from the stages shown in the City of St. Charles and at mile post 48 opposite or about opposite the Muschany land?

A. Yes, sir.

Q. Of course, you know, do you not, that sometimes land overflows, water overflows the bottom on one side of

the river because the bank is low on that side, but there is a hill or high bank on the other side to keep it from flooding?

A. Water always finds its own level.

Mr. Gentry: Mr. Blanton said that, too.

Mr. Blanton: Let him answer.

Mr. Gentry: I am not asking about a declaration of physics. I am asking about a fact.

Q. Isn't it true, because the bank is high on one side, the water, seeking its level, goes to the ground on the other [fol. 546] side, and not on the high side?

A. That is right.

Q. Not knowing the lay of this land you don't know how many times the Muschany tract was flooded during all these years, do you?

A. I go by elevations on the map.

Q. You go by that entirely?

A. Yes.

Q. You haven't any information to show what was on the Muschany side at that time?

A. You mean elevation of the land?

Q. Yes.

Mr. Blanton: The map shows that.

Mr. Gentry: Maybe you can read them, but I can't.

Q. You are going entirely by the maps and the history from the Weather Bureau?

A. That is right.

Q. As to how many times that land was actually flooded so as to interfere with crops you have no knowledge?

A. No.

Q. You know another thing, don't you, Mr. Schreiner, and that is after there is a big flood, water comes in, the greater it is it stays a good while on the land, and passes off and the land is left richer than it was before the flood came; you know that, don't you?

A. It does if it is not washed away.

[fol. 547] Q. This land evidently was not washed away because it is there yet, and the Government has asked to buy it.

Mr. Blanton: Of course, we ask that remark, which is testimony on the part of Mr. Gentry, be stricken.

Mr. Gentry: You are claiming it is there.

Mr. Blanton: A portion of the land might be there, but the top, which you seek to show was enriched, might have been washed off.

Q. You do know sometimes floods occur and such crops as clover or alfalfa survive the flood and go on and mature?

A. Yes, sir.

Q. If in September or October, 1941, there was a stand of Alfalfa over a large portion of that Muschany ground, about three feet high, although there had been floods in the spring and early summer, it would seem that the crop had survived, wouldn't it?

A. It looks like it.

Q. Yes, and every time a silt or loam solution is added to the soil, isn't it?

A. I wouldn't say that happens every time.

Q. You spoke of part of the Muschany farm having been built where the river channel used to be?

A. Yes, sir.

Q. That change was due to deposits which the river made, wasn't it?

A. Yes, sir.

[fol. 548] Q. And the deposits the river made are rich deposits, aren't they?

A. Yes, sir.

Q. So where the Muschany ground is now in the place where the channel used to be, it necessarily follows that is rich land, doesn't it?

A. Yes, sir.

Mr. Gentry: That is all.

Re-Direct Examination.

By Mr. Blanton:

Q. Have you observed sometimes when there is a flood stage that deposits of sand are made on land?

A. Yes, sir, that happens.

Q. And have you also observed that if the flood is strong enough it scours the land and removed the rich top soil, and leaves soil which isn't so fertile?

A. Yes, sir, I have seen that, too.

Mr. Blanton: That is all.

(Witness F. H. Schreiner excused).

[fol. 549] Scott Meyer, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Watson:

Q. Your name is Scott Meyer? A. Yes, sir.

Q. You live at Marion County, Missouri, and you testified in the Callaway case, number 765?

A. That is true.

Q. Passing over the qualifications as the record in that case shows and as in evidence here, I ask you if you have made an inspection of the tract here in question, the Muschany tract of 33⅓ acres? A. Yes, sir, I did.

Q. When? A. December 3, 1941.

Q. You did that at the request of the Government?

A. That is true.

Q. And were paid for it? A. Yes.

Q. Tell the Court what you found when you looked at that tract?

A. It was a rectangular tract, longer than it was wide, and running in a general way lengthwise with the length of the river and very close to the river bank.

Mr. Blanton: Mr. Gentry, for the sake of the record, may it be understood that the qualifications of these ex-[fol. 550] perts, witnesses who testified before in the case tried before all three judges, may be considered without repeating it?

Mr. Gentry: Yes. I understood you put all that in the record.

Mr. Blanton: I understood that. Except as to the valuation of this tract. Now, what was the answer? Was that question answered?

(Last question and answer repeated by the reporter)

Q. You went all over the tract, of course?

A. Yes, I did.

Q. Walked it? A. That is right.

Q. How much of that tract would you say was in crops or in cultivation at that time?

A. I thought about 25 acres, Mr. Watson.

Q. Was there any corn on it?

A. Part of the land was in alfalfa, and I would say the major part of the land that was in cultivation was in alfalfa. I believe also that toward the south end there was some corn but I am not positive. I didn't make a field note of it at the time but I think there was some corn there.

Q. You would rather not say how many acres of corn, or could you give your idea?

A. As I say, the major part was in alfalfa.

Q. 8 or 10 acres in corn, you think?

[fol. 551] A. I would say perhaps 10 acres in corn, if there was corn in, and about 15 acres of alfalfa, that is my recollection of it.

Q. What was the condition of the rest of the tract?

A. Well, the rest of the tract, that would be a triangular piece in the southeast corner, was low ground. As a matter of fact there was a slough with water between the triangular piece of low ground and the higher ground that was in cultivation.

Q. The slough ran through it and cut off part of it?

A. That is right.

Q. Was that in brush?

A. It was in willows, small willows.

Q. Willows? A. Yes, sir.

Q. 8 or 9 acres of it?

A. Yes, I thought so. About 8 or 9 acres, probably 8 acres.

Q. No fences on it? A. No, there were none.

Q. No buildings on it? A. I saw none.

Q. What was the character of the soil?

A. It was a sandy, silt loam of good quality, and the part that was in cultivation was what we would call relatively high bottom land. A land that is fertile and would work easily, I would say.

Q. What would you say of its fertility with reference to what is known as heavier bottom land?

[fol. 552] A. Well, probably from a soil analysis standpoint it wouldn't show as much, as many pounds of food elements as some of the blacker land, but from a standpoint of its handleability I would say it was very good soil.

Q. What about the subsoil?

A. I had an opportunity to observe that. I was there after the work in the area had started. I believe some wells had been drilled, and waste water from those wells was going into the river through new ditches that had been cut, and furnished one a very good opportunity to see the character of the soil and subsoil, and it was an open, sandy subsoil. Much more sand than the surface soil, of course.

Q. Would you call this a ground that had considerable sand on it?

A. Yes, but I wouldn't say too much.

Q. The sandier it is the more susceptible it is—

Mr. Gentry: Wait a minute. I object to his leading the witness. Let the witness testify.

Mr. Watson: All right, I will withdraw it.

Q. What do you say of sandy land compared with land that is not sandy, with reference to its ability to stand drouths?

A. Well, normally the sandier land doesn't stand drouths as well as land that hasn't so much sand.

Q. Now,—

Mr. Gentry: Let him finish.

[fol. 553] A. This particular land was in the bottom and I wouldn't object to it from that standpoint.

Q. Mr. Meyer, what is the practical situation if alfalfa is on the farm and it overflows; does it deposit dirt and this and that in the alfalfa so you can't cut it very well?

A. Yes. I think that would depend a little bit upon the time of the year, Mr. Watson.

Q. I mean when there is a crop there.

A. Yes. If there were a growing crop ready to cut, the overflow would leave silt and dirt on the leaves; it

would render it unfit for cutting unless there was a subsequent rain that took it all off. Then I think this is probably true, too, that an overflow that deposited very much silt there would probably cover the crown to an extent that would damage it.

Mr. Gentry: I didn't hear that. What was that?

A. I think that where there was an overflow of a material deposit of silt it would probably cover the crown of the plant to such an extent it would affect the stand.

Q. Did you find any houses or improvements in that bottom anywhere under the bluff?

A. Yes. Not in that, not on that tract or any of the immediate tracts there. However, since work in the area had started and demolishments had been carried forward, there could have been buildings that I didn't see. I did [fol. 554] see one house to the west of the tract, and I believe just outside of the area fence, where there was a house, west, I believe, of a tract belonging to a Mr. Theodore Lemmert. That was the only house I observed.

Q. Mr. Meyer, from your knowledge of farming, and the improvements on farms, and what the farmers do, would you say this tract of land was one that one might well put a house on and occupy it on the farm as an owner?

A. No, I don't think that is a suitable area on which to build a home, due to the danger of flooding.

Q. How far away is it from the nearest town or village?

A. I think it was about a mile and a quarter out of the little village of Hamburg, south and a little west.

Q. Which road and which way did you go from the Highway 61 into this tract, and give the distance?

A. We didn't go from Highway 61 in, or I didn't. I went south from the area and came down close to the village of Hamburg over, I believe, Highway 94, and then followed a county dirt road through the bottom, which came along on the north side of the land that belonged to the gentlemen from whom Mr. Muschany testified he bought it, and this county gravel road came fairly close to Mr. Muschany's land before it turned west.

Q. If you were going from this land to Highway 61 which way would you go, and how far would it be, approximately?

Mr. Gentry: Do you mean before this tract was fenced or now?

[fol. 555] Mr. Watson: Yes. I mean before the Government—

Mr. Gentry: I understand he wasn't familiar with it at that time. He went out there long after the Government had taken possession and fenced the tract.

Mr. Watson: That can be proved by somebody else.

Q. Do you know where—could you tell by looking at the roads whether they were roads that had been there some time?

A. Yes; this county road through the bottoms, dirt road, had been there for some time according to all appearances.

Q. Do you think you are able to say what the travel would be from this land to Highway 61 before the Government came along with the project?

A. I saw Highway 94 from where the dirt road hit 94, and then out near where the port of entry is, as I recall, but whether there is a shorter way I don't recall.

Q. About how many miles was that?

A. That was quite a way. I think six or seven miles at least.

Q. That is, you would go north from this tract of land, as I understand, through the bottoms to the bluff and then up over the bluff?

A. That is right.

Q. And a little farther you hit 94? A. That is right.

Q. And then into 61? A. Yes, sir.

Q. You found no evidence of any school houses or churches in that immediate community there?

[fol. 556] A. Not in the bottoms.

Q. How far was it from the next town as you went on that side of the river after you passed Hamburg?

A. I think it was Howell, the village of Howell.

Q. How big a place is Hamburg, about?

A. I don't believe I can state that, Mr. Watson.

Q. A small village?

A. I took it to be a village.

Q. Taking into consideration the location of this place, and the testimony you have given, and its proximity or

lack of proximity to the highway and the cities and towns as you know them, what would you say was the reasonable value of this farm along about November, 1940?

Mr. Gentry: Just a moment, please. If Your Honor please, I object to all testimony along this line as to the value of the land, for the reason that this contract was determined and entered into, the option contract by the Government agency, and under the law, the Government agency having exercised its discretion and made this contract, the matter cannot be inquired into by any court, the court has no jurisdiction to inquire into it.

The Court: Overrule objection.

Mr. Gentry: May that apply to all of the testimony, without repeating it?

The Court: Yes, as far as the Court is concerned.

[fol. 557] A. $1,250.00. May I qualify that? As I understand, you say taking into consideration its location, which I did, in arriving at that value.

Mr. Gentry: What was your answer?

A. I say—

Mr. Gentry: I know, but you stated a figure before that.

A. $1,250.00. That it was located on the river bank and so very close to the river bank that I had to study about what to do with what I consider sort of waste land there, and I rather thought, in arriving at my figure, that the river that made that land could maybe take it away, and I thought of that in making that figure.

Q. I will ask you this, Mr. Meyer: From your experience and observation and knowledge of rivers, don't they have a tendency to flop from one side of the bluff to the other, and that depends a good deal on where it cuts in above, and that makes it cut across the other way below?

A. I think that is true.

Mr. Watson: That is all.

A. It has been my observation, at least.

Cross-Examination.

By Mr. Gentry:

Q. I didn't hear the last half of your answer. You think it is true, what?

[fol. 558] A. It has been my observation. That has been my observation, at least.

Q. Now, as to the bank itself, did you observe the bank of the river had been rip-rapped with stone?

A. Yes, I did, Mr. Gentry.

Q. Isn't that done with the express purpose of preventing the river from washing the bank?

A. I would take it so. I think the Government is trying to control the river and keep it within a certain channel.

Q. Haven't you observed when that is done it does so control the channel very largely?

A. Possibly very largely, but I think the Missouri River in particular is a very unpredictable sort of river.

Q. Now, how much an acre do you value this land?

A. I valued the land, I considered the usuable land at $50.00 an acre, Mr. Gentry, with the part that was lower land, willows and slough, at nothing, because while I thought the future changes in the river might make farming land out of that portion by leaving deposits of silt which would bring it to a level so it could be cultivated, it was perhaps equally within the realm of possibility the river might take away some of the land that is now good.

Q. Now, I believe you said according to your best estimate about 25 acres were in cultivation?

A. That is true.

[fol. 559] Q. And that most of that was in alfalfa?

A. Yes.

Q. And then in the south end you thought there were about 8 or 10 acres in corn, didn't you? A. Yes.

Q. Was that in addition to the 25?

A. No. That would be included in it. I said about 15 or 16 acres, as near as I can measure, in alfalfa, and perhaps 10 acres in corn.

Q. That would make 26 acres in cultivation. How much did you figure in that low place you designated as a slough?

A. In the slough and in the land between the slough and the river I thought there was about 8 acres.

Q. About 8 acres?

A. Yes. That would be in the southeast portion—southwest portion I guess it would be, Mr. Gentry.

Q. What did that alfalfa crop look like when you saw it in December?

A. It showed evidence of a recent flood, that is, I mean during the late season. It looked like good alfalfa.

Q. There had been a very extraordinary rainy season in September and October—

A. Yes, I knew that.

Q. —had there not? A. Yes, sir, there had.

Q. And a great deal of land was flooded, where the water didn't come out of the river but was just from the clouds; isn't that true?

A. I expect that would be true in parts of the coun-[fol. 560] try, but this was a case where the river had been up.

Q. Now, your valuation of $50.00 an acre was for how many acres?

A. I figured the number of cultivating acres.

Q. About 26? A. I thought 25. 25 or 26.

Q. That would be about the figure you gave then?

A. That is right.

Q. You don't think any of that land was worth more than $50.00 an acre?

A. No. In view of its uncertainty, the uncertainty whether there would be land there, and the uncertainty of the crops. I thought it was good land but hazardous land.

Q. Did you ever live in that neighborhood?

A. No, I have not.

Q. What was the closest you lived to it?

A. About 100 miles north, at Hannibal.

Q. Land up there is different?

A. Yes, it is different. However, we are on the Mississippi River and have bottom land.

Q. You don't know what land has been sold for in the neighborhood, do you?

A. No, I didn't make any examination of the records.

Q. You don't know whether any of it sold for as much as $125.00 or $150.00 an acre?

A. Not of my own personal knowledge.

Q. You have no knowledge on that subject?

[fol. 561] A. No, I have not.

Q. You made no inquiry of people to find out the value of the land?

A. No. That was the scope of my inquiry. The Government wanted my idea of what it was worth, as an appraiser.

Q. You know the little town of Defiance?

A. I don't believe I do, Mr. Gentry.

Q. Right on the river bank. Do you know about the presence of a little school house about a mile and a half along the road from the Muschany farm toward Defiance? Did you see a school house there?

A. I don't recall it.

Q. You don't remember seeing one. You don't remember whether it might have been torn down before you were there?

A. I have no recollection of seeing it. As I say, I was there in December, 1941, and I have no recollection.

Q. But you did say you consider this as good fertile land, didn't you? A. That is true.

Q. And while there was a sandy subsoil it was loose enough so you didn't consider that as damaging to the soil? A. Yes, sir.

Mr. Gentry: That is all.

Mr. Watson: That is all, Mr. Meyer.

(Witness excused.)

The Court: Suppose we take a recess of ten minutes.

(Recess)

[fol. 562] J. A. Mocabee, a witness of lawful age, being being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination

By Mr. Watson:

Q. Mr. Mocabee, state your full name and residence and business.

A. J. A. Mocabee, Sikeston, Missouri; Land Bank appraiser.

Q. You are with the Federal Land Bank? A. I am.
Q. How long have you been with them?
A. About fifteen years with the Federal Land Bank.
Q. You didn't testify in the Callaway case?
A. I did not.
Q. What has been your duty with the Federal Land Bank?
A. Appraising lands for loans, resales. For loans and resales.
Q. What territory have you worked in?
A. For the Federal Land Bank?
Q. Yes.
A. Missouri, Arkansas and parts of Illinois.
Q. Have you appraised any lands in St. Charles County? A. I have.
Q. About how many appraisals have you made of lands?
A. Taking all together before I went with the Federal, probably six thousand.
Q. Six thousand farms that you have appraised?
A. That is an estimate.
Q. Yes. You are still with them? A. I am.
[fol. 563] Q. Have you appraised lands in St. Charles County similar to the land here in suit, the Muschany tract? You know this tract, don't you? A. I do.
Q. You have inspected it?
A. I have. I have not made any appraisals on river bottom lands.
Q. When did you inspect this farm?
A. May 1, 1941.
Q. What did you do when you went out there and looked at it? Did you walk all over it?
A. I walked over the farm, took into consideration the size, shape, location, and all other known and apparent factors and conditions.
Q. What did you find? How many acres of it in alfalfa?
A. Well, I estimate between 8 and 10 acres.
Q. How many acres in or had been in other crops, and what crops?
A. Well, I noticed some corn stalks. Approximately 8 acres in corn.
Q. That was what time of year? A. May 1, 1941.

Q. What was the rest of the place in?

A. Well, it was idle at that time. There was no—I didn't see any evidence of crops.

Q. I mean willows or brush. How much of it do you think was in willows or brush or creek?

A. Well, I estimated there was about 20 acres in cultivation at that time or could be cultivated, and the bal-[fol. 564] ance in brush, right-of-way and slough.

Q. Is there a slough that cuts across this tract?

A. A slough cuts across the northeast corner, runs from northeast to southwest through the tract.

Q. Have you appraised similar land in St. Charles County?

A. No, I don't believe I appraised any river bottom land in St. Charles County except on this project.

Q. From your knowledge of land values, and of viewing this property and its location and quality, what would you say is the fair rental—fair market value of this tract as of about November, 1940?

A. I placed a value of $1,500.00.

Q. $1,500.00? A. Yes, sir.

Mr. Watson: I believe that is all.

Cross-Examination.

By Mr. Gentry:

Q. Did you observe the alfalfa on that farm?

A. Yes, I did.

Q. How did it look?

A. Well, it looked very good at that time.

Q. Pretty tall, was it? A. Yes.

Q. And green? A. Very pretty alfalfa.

Q. And clean? A. Yes.

Q. Looked like a good crop?

A. Looked like a very good crop.

Mr. Gentry: That is all.

(Witness J. A. Mocabee excused.)

[fol. 565] CHARLES S. CARDWELL, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. Your name is Charles S. Cardwell, and you testified in the Callaway case? A. Yes, sir.

Q. Mr. Cardwell, I will ask you if you, at the request of the Government, went out and looked at this farm here in suit, the Muschany tract? A. Yes, sir, I did.

Q. When? A. On November 18, 1941.

Q. Did you walk over all of it?

A. Yes. All except the low ground.

Q. You examined the quality of the soil? A. Yes.

Q. And the crops on the place? A. Yes.

Q. About how many acres would you say were in brush or willows? A. Oh, about 8 or 9 acres.

Q. And about how many acres in corn or that showed evidence of having been in corn last?

A. Oh, about 10 or 12 acres.

Q. What would you say was the fair market value of this tract as of about November, 1940?

A. $2,335.00.

Q. Now, they had—tell the Court whether you saw [fol. 566] any high passways from the higher land over toward the bluff out toward this tract of land?

A. Oh, yes. There were some runways from the bluff over to the wells. Part of the TNT area.

Q. Did you drive under those runways in going to and from this tract? A. Yes.

Q. About how high were these runways from the ground?

A. 7 or 8 feet high. An automobile cleared nicely.

Q. No houses in that immediate section there?

A. No. Except one. There was one over in the bottom there.

Mr. Watson: That is all, I believe.

Cross-Examination.

By Mr. Gentry:

Q. Those runways were something like half a mile away from the Muschany tract, weren't they?

A. No. There was one runway ran out to a well there on the river bank, I believe, on the Muschany tract.

Q. Now, you say at that time there was some alfalfa on there? A. Yes.

Q. Or did you say about how many acres of alfalfa?

A. Oh, 10 or 12 acres of alfalfa.

Q. What did it look like?

A. It showed signs of a recent overflow then. It was matted down, and, of course, that was in November.

[fol. 567] Q. It showed it had been a pretty fine crop?

A. It showed a very good stand of alfalfa.

Q. Was it in September or October we had such heavy rains last year a great many places were flooded that weren't ordinarily flooded?

A. I believe in October.

Q. Even in your county, Montgomery County, you had a terrific flood up there where there isn't any river at all?

A. We have a river there.

Q. You had some on Mr. Schrader's ground where he and I hunt quail in the fall? A. Yes.

Q. Some water was 8 or 10 feet over ground where they have quail? A. Yes.

Q. The rain had a great deal to do with floods last fall? A. Yes, the rain caused it.

Q. Where was this house you saw?

A. I have forgotten the gentleman's name, but it was outside the area and up the bottom towards Defiance.

Q. It was still in the river bottom?

A. Still in the river bottom. I didn't go to it. I presume it is on a high spot.

Q. Did it look like a brand new house or one standing for years? A. It is an old house.

Q. Did you see a school house?

A. Yes. I am familiar with that school house.

[fol. 568] Q. Was that still there last fall?

A. I am sure it is.

Mr. Gentry: That is all.

Redirect Examination.

By Mr. Watson:

Q. Mr. Cardwell, did you ever know of a flood that wasn't caused by rain or snow? A. No.

Mr. Watson: That is all.

(Witness Charles S. Cardwell excused)

[fol. 569] FORREST HUGHES, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. Mr. Hughes, you have testified in case 765, the Callaway case, in this court? A. Yes, sir.

Mr. Gentry: What are his initials, please?

[A.] Your name is Forrest Hughes? A. Yes, sir.

Q. You heard Mr. Cardwell's testimony? A. Yes, sir.

Q. Would you say that what he testified to is substantially correct as to the physical condition of this farm here, the Muschany farm?

Mr. Gentry: When did he see it? He saw it about the same time, did he?

Q. Yes. You saw this farm about the time Mr. Cardwell did, didn't you? A. Yes, sir.

Q. You say the testimony he gave as to physical facts is substantially accurate? A. Yes, sir.

Q. What, in your opinion, was the fair market value of this farm as of the date of about November, 1940?

A. About $2,490.00.

Q. $2,490.00? A. Yes, sir.

Mr. Watson: I believe that is all.

Mr. Gentry: I believe that is all.

(Witness Forrest Hughes excused.)

[fol. 570] R. C. MURPHY, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. Your name is R. C. Murphy? A. Yes, sir.

Q. You have testified in the Callaway case that was tried in this court the first of last week? A. I did.

Q. Have you, at the request of the Government, inspected this Muschany tract that is here on trial?

A. I have.

Q. When? A. November 18, I believe, 1941.
Q. You heard the testimony just given by Mr. Cardwell?
A. I did.
Q. Would you say that testimony is substantially accurate as to the physical condition of the tract in question?
A. It is.
Q. What, in your opinion, was the fair market value of that tract as of about November, 1940?
A. $2,500.00.

Mr. Watson: That is all.

Mr. Gentry: That is all.

(Witness R. C. Murphy excused.)

[fol. 571] (John Weber.)

Mr. Watson: Mr. Kopetco? (No answer) Mr. Weber? All right, Mr. Weber.

JOHN WEBER, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:
Q. State your full name and residence.
A. John Weber, 1140 Edward Terrace, Richmond Heights.
Q. Where were you born and raised, Mr. Weber?
A. In St. Louis.
Q. What is your present business?
A. I am an appraiser for the Home Owners' Loan Corporation.
Q. How long have you been so engaged?
A. Since 1933.
Q. In that business you have inspected and placed values on various farm lands and other properties?
A. Yes, sir.
Q. Over what territory?
A. The eastern half of Missouri.
Q. Tell the Court what you have done, among other things, in familiarizing yourself with values of farm lands.
A. Our properties include principally residential and [fol. 572] farm properties. We make a careful survey on

a comparison basis with other properties being sold or offered. Activity is considered among other elements.

Q. Before you went with the Home Owners' Loan Corporation were you in the farm appraisal business?

A. Not exclusively. I was in the real estate business, however. I handled farm sales as well as suburban.

Q. Both sales and appraisals? A. Yes.

Q. I will ask you if you have, at the request of the Government, gone out and inspected this farm here, the Muschany tract?

A. Yes, sir.

Q. When? A. September, 1941.

Q. In order to shorten the time, did you hear Mr. Cardwell testify? A. Yes, sir, I did.

Q. Would you say that it is substantially correct as to the physical condition of this farm? A. Yes.

Q. What, in your opinion, was the fair market value of this farm as of about November, 1940? A. $2,333.00.

Mr. Watson: That is all.

Mr. Gentry: I didn't catch the exact figure.

A. $2,333.00.

Mr. Gentry: I believe that is all.

(Witness John Weber excused.)

[fol. 573] S. C. Harvey, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. State your full name, age, residence and occupation.

A. S. C. Harvey. I am 58 years old; live in the City of Webster Groves, and I have been in the real estate business in St. Louis County, at the City of Clayton, for about somewhere between 18 and 20 years.

Q. And as such your real estate activities have extended over into St. Charles County? A. Yes, sir.

Q. You testified in the Callaway case? A. Yes, sir.

Q. Mr. Harvey, I will ask you if you inspected, at the request of the Government, the farm here in controversy, the Muschany tract of 33⅓ acres?

A. Yes, sir.

Q. When?

A. In October and sometime in November, 1941.

Q. You heard Mr. Cardwell's testimony, did you?

A. Yes, sir.

Q. Would you say his testimony was substantially accu-
[fol. 574] rate as to the physical condition of the farm, or if there is anything in addition I would be glad for you to state?

A. Well, the only difference I had was in the difference of acreage that was in willows and slough and brush. I had about 13 acres in there.

Q. In which? A. In the slough, brush and willows.

Q. Outside of that, you say his testimony was about as you would say? A. Yes, sir.

Q. Now, there is a slough that runs through this tract?

A. Yes, sir.

Q. The Muschany tract? A. Yes, sir.

Q. And what time was it you were out there?

A. In October the first time, and the second time was in November.

Q. Did you see any evidence of there having recently been high water?

A. Well, we had a pretty hard time getting over it, because we waited for the water to get off it, and the alfalfa was pretty well covered with silt, and the ground had quite a little deposit on it; and also while we were walking across it, in a little pocket there were several small fish that got caught in the pocket and didn't get out.

Q. Were they live or dead fish?

A. They were alive.

Q. Swimming around in the water on the place?

A. Yes, sir.

[fol. 575] Q. Was Mr. Thursby with you?

A. Mr. Thursby and your associate out there.

Q. Mr. Guest? A. Mr. Guest, yes.

Q. Mr. Harvey, what would you say was the fair market value of this farm as of about November, 1940?

A. Right at $2,000.00.

Q. About $2,000.00? A. Yes, sir.

Mr. Watson: Take the witness.

Cross-Examination.

By Mr. Gentry:

Q. That is exclusive of the fish, was it?

A. These were only small, probably six or eight-inch, fish.

Q. You didn't catch them?

A. No. They got caught in the pocket there.

Q. They make good fertilizer, don't they? A. Yes.

Q. What did you say about the alfalfa that was covered over?

A. That was the second time, in November, when we saw the deposit on there.

Q. When was it you visited it, in October?

A. Well, we went down to go on the property but it was still pretty bad and we didn't go onto it. We were near it and looked over it but didn't go over it.

Q. After the water had subsided somewhat you went back in November and found those fish you were telling us about?

A. Yes, sir.

Mr. Gentry: That is all.

(Witness S. C. Harvey excused.)

[fol. 576] J. R. Thursby, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. Your name is J. R. Thursby, and you testified as a witness in the Callaway case? A. I did.

Q. Did you, at the request of the Government, inspect the property here in question, the Muschany tract?

A. I did.

Q. When? A. In November.

Q. November, 1941? A. 1941, yes, sir.

Q. You have heard the testimony just given by Mr. Harvey? A. I did.

Q. Were you and he together?

A. I wasn't there the day he saw the fish.

Q. You were there the second trip he mentioned?

A. I was with him that day but did not see the fish. I had left the party and had gone over to the Darst Bottom tract, and had a narrow escape from quicksand on the Darst Bottom tract, and I came back and they told me about the fish on the way back from the place, and I didn't get a chance to see those fish.

[fol. 577] Q. Would you say that the testimony that he gave, outside of your not seeing this fish, with reference to the physical condition of this farm was substantially accurate?

A. I would.

Q. What, in your opinion, was the fair market value of this farm as of about November, 1940? A. $1,375.00.

Mr. Watson: That is all, I believe.

Cross-Examination.

By Mr. Gentry:

Q. You never were there when they were harvesting crops, were you? A. No, sir.

Q. You don't know of your own knowledge about how many crops of alfalfa were cut off the farm in 1940?

A. No, sir.

Q. Or how many bushels of corn an acre were raised in that bottom land? A. No, sir.

Mr. Gentry: That is all.

(Witness J. R. Thursby excused.)

[fol. 578] L. E. Tutt, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. Watson:

Q. Your name is L. E. Tutt? A. Yes, sir.

Q. And you were raised at Unionville, Missouri?

A. No, sir. I have lived there for a number of years.

Q. What is your present vocation, Mr. Tutt?

A. A Land Bank appraiser, Farm Credit Administration.

Q. How long have you been so engaged?

A. Since July, 1933.

Q. You have owned real estate? A. Yes, sir.

Q. Farms? A. Yes, sir.

Q. You have appraised a great many farms where, in what territory? A. In most of north Missouri.

Q. About how many farms would you say you have appraised for the Government?

A. Oh, approximately two thousand.

Q. Did you, at the request of the organization you work for, make a trip out to the TNT area and inspect the farm [fol. 579] here in question, the Muschany tract of 33⅓ acres?

A. Yes, I did,

Q. When? A. About May, 1941.

Q. Tell the Court what you did when you did that?

A. Well, I walked over the tract, observed all the different factors that might make up the value of this tract, as I do in any appraisal.

Q. How many acres would you say at that time were in willows or brush or creek?

A. Well, approximately 13 acres.

Q. How much in alfalfa?

A. Approximately 8 or 10 acres in alfalfa.

The Court: 18?

A. 8 or 10, the best we could tell.

Q. And what was the other part of the tract in or did it show evidence of having been in?

A. It showed evidence of some of it having been in corn, although we were there soon after an overflow and it was rather hard to tell what it had been in.

Mr. Gentry: Soon after what?

A. An overflow.

Q. What, in your opinion, was the fair market value of that farm as of about November, 1940?

A. $1,500.00.

Mr. Watson: Take the witness.

[fol. 580] Cross-Examination.

By Mr. Gentry:

Q. Your training has all been for low appraisals, hasn't it? A. I didn't get that.

Q. Conservative appraisals? A. No, sir.

Q. When you appraise for a bank of any kind don't you always appraise with a view of being very conservative in the values you give? A. No, sir.

Q. You don't take into consideration that the party may not be able to pay the loan and there may be quite a bit of chances at a forced sale?

A. We take that into consideration but not in valuing the farm.

Q. So your opinion is $1,500.00, did you say?

A. Yes, sir.

Q. Was the fair market value of this property. Do you know anything about any sales in that neighborhood of your own knowledge?

A. Well, we had checked sales on different properties there; had a list of those that had been checked.

Q. What did you find some of those sales to be?

A. Well, of course, we found this sale to be $1,000.00 in 1939.

Q. Yes, but what others did you find?

A. I don't recall any particular sales in this immediate vicinity.

[fol. 581] Q. Do you recall any sold before or after that time at $125.00 or $150.00 an acre? A. I did not.

Q. You weren't impressed with any other sales except this one?

A. Just in the general area we checked sales on different properties. I don't remember any in particular.

Q. Can you tell us of any other sale now?

A. I cannot definitely.

Q. Did you take those other sales into consideration in arriving at the value of the property in question here?

A. In a general way.

Q. Still you can't tell us of a single one you took into consideration, can you?

A. I can't recall any to mind now.

Q. Can't you recall you saw a piece of property in that neighborhood that sold at $125.00 an acre, and another that sold at $150.00 an acre?

A. No. I cannot.

Q. Can you recall what any did sell for, without being specific as to the owner? In your check did you come across what any sold for?

A. I can't now.

Q. You can't tell of any except this one piece you were impressed with because it sold for $1,000.00?
[fol. 582] A. Not necessarily because it sold for $1,000.00.
Q. You knew it was contracted to be sold to the Government for $4,500.00? A. I did not know that.
Q. You did not know that? A. No.

Mr. Gentry: That is all.

The Court: That is all.

(Witness L. E. Tutt excused.)

Mr. Watson: We rest.

(Plaintiff Rests.)

[fol. 583] (Further Testimony for Defendants in Rebuttal.)

Thereupon, the defendants, through their counsel, offered in rebuttal on their behalf the following evidence:

Mr. Gentry: Mr. Langenbocker?

Robert A. Langenbocker, a witness of lawful age, being duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:
Q. Your full name is R. A. Langenbocker?
A. Robert A. Langenbocker.
Q. You live in the City of St. Charles?
A. Adjoining the City of St. Charles.
Q. Your position there in the city is what?
A. Agricultural agent.
Q. You are employed by the University of Missouri, I believe, you testified? A. Yes, sir.
Q. You did testify in the case in which Mrs.—what is her name?

Mr. Blanton: Callaway.

Q. —Callaway was interested last week? A. Yes, sir.
Q. What familiarity have you now and have had for some years with land located in the vicinity of this tract [fol. 584] of Karl and Vera Muschany?

A. I have been over that particular tract and the bottom in general a number of times, and I have acted as agent for two tracts of land in that immediate vicinity.

Q. What two tracts of land?

A. Doctor Heinrichs' land, and the Howell and Pew estate.

Q. What have you to do with them?

A. I acted as adviser with Doctor Heinrichs when he bought the farm, and I have handled the Howell and Pew estate for a number of years, and am still acting.

Q. Do you know when Doctor Heinrichs bought that property?

A. I think along about 1934 or 1935, along about that time.

Q. Did you personally become acquainted with the fact of what he paid for that property? A. Yes, sir.

Q. What did he pay for it?

A. $135.00 an acre.

Q. How was that situated with reference to this Howell land; was it nearer to Defiance or farther from Defiance?

A. Nearer to Defiance.

Q. Was it joining the river bank like the Muschany land or farther from it?

A. It was slightly farther from it. Part of it went practically to the river bank. I am not sure it just touched the bank. And about the same level as the upper part of the Muschany tract.

[fol. 585] Q. Are you familiar with crops that were raised on either the Muschany land or land very close by of the same quality? A. Yes.

Q. What crops was it particularly adapted to, if any?

A. That is sarpy or black, sandy, silt loam soil that we consider the very best alfalfa land that we have in the county. We think of that because it does not need liming, and it is very highly productive land.

Q. As to raising a corn crop, is it fertile for that purpose? A. Yes, very much so.

Q. This estate land you spoke of, where is that located?

A. It is not any farther south than Heinrichs'. I think about a mile south of the Muschany tract but bordered along, nearly a mile of it is on the river.

Q. What do you know about any sale of that land or purchase price paid for it, and when?

A. That land has not been sold. That is still held by the same parties.

Q. By the Pew estate? A. By the Pew estate.

Q. Now, Mr. Langenbocker, you are familiar in a general way with real estate values of farms in that county?

A. I believe so.

Q. Your training has been along the line you described in your testimony last week? A. That is right.

[fol. 586] Q. Taking all factors into consideration what would you say, in your opinion, was the fair market value of the Muschany tract, taking an average of 33⅓ acres, as of November, 1940?

Mr. Watson: We object. The witness has not qualified sufficiently.

Mr. Gentry: If you will point out in what respect you would like to have him further qualify, or you can do so in cross-examination.

Mr. Watson: I don't care to do that.

The Court: Overruled.

Mr. Gentry: You are permitted by the Court to answer.

A. $150.00 an acre.

Mr. Gentry: You may examine.

Cross-Examination.

By Mr. Watson:

Q. Mr. Langenbocker, you say you are the farm adviser? What is your capacity in St. Charles County?

A. County Agricultural Agent.

Q. County Agricultural Agent. What salary do you get a year? A. $3,600.00.

Q. How much other money is appropriated either by the County or State or Federal Government toward the upkeep of your office or the expenses of it?

A. Around $2,000.00.

[fol. 587] Q. How much does the county court appropriate? A. $1,850.00.

Q. The general sentiment out in St. Charles County is, of course, for these people to get as much as they can out of this land, is it not?

A. Repeat that question again, please?

Q. The general sentiment out in St. Charles County, and among people you deal with, is for these people to get as much as they can for this property? A. No.

Mr. Gentry: I object to that as immaterial, what other people would like to see done.

A. I want to make a correction: That is $2,850.00 we get from the county court, and the balance, about $3,000.00, toward expenditures for the county office. No part of which is my salary. My salary comes entirely from the University of Missouri.

Q. But you do get from locally approximately $2,800.00 or $3,000.00? A. I do not, personally.

Q. Your office does?

A. Let me put that right: The county court approximately $2,850.00, and there is approximately $150.00 additional comes in from different sources. Sometimes merchants' contributions, sometimes farmers' contributions, but that goes to keep the office. There is a requirement of placing [fol. 588] the agent of the county. I do not get any part of that as my salary.

Mr. Watson: That is all.

Redirect Examination.

By Mr. Gentry:

Q. I want to ask you a question or two about precautions, if any, that have been taken against overflows: Are you familiar with the rock work along the bank of the river on the Muschany tract?

A. I am not familiar with the rock along the bank. I know rows of pilings have been driven from the south end of the Howell-Pew tract where the river turns east a little, so those pilings run from the hill or high land, the second bottom, out to the river, and there are three of those stretches across the Pew land in about a mile, which are put there to stop the river from cutting in straight as it one time did as the testimony developed a while ago.

Q. Does the water coming down the river reach those pilings before reaching the Muschany land?

A. Yes, a mile before.

Q. They are above the Muschany land?

A. That is right. They are above the Muschany land.

Q. What have you observed the effect that piling has had upon stopping the water?

[fol. 589] A. They very definitely stop the flow of water to this extent, that most of those pilings, except down near the river, are over or level with the top of the ground. Right next to the river, I would say for 15 or 20 rods, they are from a foot to two-foot and a half possibly, but the only water that gets into those tracts is backwater as we call it.

Q. Has the dirt over those pilings been deposited in flood times? A. Yes.

Q. What have you noticed there or elsewhere as to the effect when water comes out of the river bank, where are deposits made first, near the river bank or where?

A. When water leaves the main flow as straight as the Missouri the water goes over the bank and all the heaviest soil particles drop out. That is true all along the Missouri River, and wherever that water slows the least bit the heavier particles drop out, with the result the soil next to the water is a foot to two-foot higher than it is back in the interior of the build-up.

Mr. Gentry: That is all.

Recross Examination.

By Mr. Watson:

Q. Mr. Langenbocker, how long have you been out in St. Charles County? A. Nineteen years.

[fol. 590] Q. The Missouri River cuts on one side and then on the other more rapidly than the Mississippi does? Does it or not?

A. I don't know anything about the Mississippi, but the Missouri River does cut more rapidly on one side than on the other side.

Q. The Mississippi borders your county, does it?

A. Yes, sir.

Q. Haven't you paid any attention to the east part of your county?

A. I get over there once in a while.

Q. It is mostly out in the TNT area?

A. What is that?

Q. It is mostly out in the TNT area? A. No, sir.

Mr. Watson: That is all.

Mr. Gentry: May Mr. Langenbocker be excused?

Mr. Watson: As far as we are concerned.

(Witness R. A. Langenbocker excused).

[fol. 591] (EDWIN BECKER.)

Mr. Gentry: Mr. Becker? Come around, Mr. Becker.

EDWIN BECKER, a witness of lawful age, being duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:

Q. Tell the Court your name, please, Mr. Becker.

A. Edwin Becker.

Q. Where do you reside? A. At Farmington.

Q. Did you ever live in St. Charles County?

A. Yes, sir.

Q. When did you live there?

A. Practically all my life.

Q. When did you leave there? Maybe we should put it that way.

A. I lived in Warren County about seven years.

Q. Did you say you lived in St. Charles County before that? A. Yes, sir.

Q. Most of your life? A. Yes, sir.

Q. Well, when did you leave St. Charles County?

A. I think in 1913.

Q. Did I understand you right? You say you live at Farmington or Warren County? A. Warren County.

Q. I misunderstood you. I thought you said Farmington. Near what town do you live?

A. Near Marthasville.

[fol. 592] Q. When you lived in St. Charles County where did you live?

A. Well, I was born there, raised around Femme-Osage.

Q. That is the name of a creek?

A. It is the name of a town.

Q. Well, it is the name of both a town and a creek?

A. Yes, sir.

Q. Where is the town of Femme-Osage with reference to the town of Defiance, let's say?

A. About 12 or 15 miles west.

Q. West of Defiance? A. Yes, sir.

Q. Do you know this tract of land that has been referred to here as the Muschany 33⅓-acre tract? A. Yes, sir.

Q. How long have you known it?

A. About 21 years.

Q. Did you ever work it or live on it? A. No, sir.

Q. Live close to it at any time?

A. Lived about a mile west of it.

Q. Who had it when you were living at that point?

A. Who had the ground, you say?

Q. Yes, sir. Who cultivated it?

A. Well, different parties. Mr. Cunningham owned it.

Q. Did you see the crops that grew on it?

A. Yes, sir.

Q. About when was it you were living a mile and a half from it?

[fol. 593] A. Well, I have been living there for 21 years.

Q. Did you own the farm a mile and a half from it?

A. Yes, sir.

Q. What did you pay for that farm?

Mr. Blanton: I think there ought to be some showing here of similarity and so forth before it is competent.

Q. All right. How is that situated with reference to the Muschany property. Was it farther from the river, right on the river or in the bottom land or where?

A. A little farther from the river.

Q. A little farther from the river? A. Yes, sir.

Q. Was it north or west of the Muschany tract?

A. West.

Q. You said about a mile and a half?

A. About a mile.

Q. How big was your farm? A. 68 acres.

Q. Was it cleared or brushy?

A. What did you say?

Q. Was it cleared or brushy?

A. All cleared.

Q. All cleared? A. Yes, sir.

Q. What did you raise on your farm?

A. Well, alfalfa, corn and wheat.

Q. How did the productivity of the Muschany farm compare to yours, if you know?

A. Well, about the same.

[fol. 594] Q. And do you know about how many bushels of corn per acre were customarily raised on the Muschany tract? A. Yes, sir.

Q. How many? A. 50 to 75 bushels an acre.

Q. How about alfalfa, do you know how many crops of alfalfa were grown on it? A. About four crops.

Q. And as to the quality of the alfalfa, did you see the alfalfa that grew on it? A. Yes, sir.

Q. I will ask you now, in view of what you have testified to, what you paid for your farm?

A. Yes, sir.

Q. What did you pay for your farm?

Mr. Watson: We object to that. There is no evidence as to the improvements. He said he lived on his farm.

The Court: And the time.

Mr. Watson: And the time.

Q. Tell us what improvements were on your farm when you bought it.

A. Well, there was good buildings on it.

Q. There were good buildings? A. Yes, sir.

Q. Well, do you know in a general way about the value of farm lands in that community?

A. You mean what land has been sold for?

[fol. 595] Q. Yes, and what it was worth, reasonably worth, in 1940.

A. Well, it is worth about $150.00.

Mr. Watson: We object to the witness testifying that way without having qualified.

Q. The question is, do you know what it was worth, and what land sold for, of that kind and character without improvements, in 1940? A. Well—

The Court: Without improvements.

Q. Do you know? The question is to be answered yes or no. Do you know what land sold for in that neighborhood in 1940? Do you know the values? A. Yes, sir.

Q. Now, in your opinion, what was the Muschany tract worth in November, 1940? A. What it was worth?

Q. Yes, the fair and reasonable market value, in your opinion? A. $3,500.00.

Q. $3,500.00? A. Yes, sir.

Q. Did you fix the amount per acre a while ago or not? Did you state what you thought it was worth per acre?

A. Not that particular tract.

Q. Your best judgment is it was worth about $3,500.00 an acre at that time? I don't mean $3,500.00 an acre. The tract, I meant to say.

Mr. Watson: You mean what you said, don't you?

[fol. 596] Mr. Gentry: How is that?

Mr. Watson: You mean what you said, don't you? $3,500?

Mr. Gentry: That was a slip of the tongue.

Cross-Examination.

By Mr. Watson:

Q. What is your full name? A. Edwin F. Becker.

Q. Where were you born? A. Around Femme-Osage.

Q. How long did you live there?

A. Oh, until I was about 25 years old.

Q. How old are you now? A. 57.

Q. Where did you move when you left Femme-Osage?

A. I moved to Warren County.

Q. What place? A. Close to Marthasville.

Q. Close to Marthasville? A. Yes, sir.

Q. How long did you live there? A. Seven years.

Q. Where did you go when you left Marthasville?

A. I moved to Defiance.

Q. How long did you live there? A. 21 years.

Q. You lived in the town of Defiance?

A. No. Near Defiance.

Q. And where did you go when you moved from there?

A. I am still living there.

Q. I thought you said you lived in Warren County?

A. At Warren County, I said.

[fol. 597] Q. You live in Warren County now?

A. No, sir.

Q. What county do you live in?

A. St. Charles County.

Q. How far from this land? A. About a mile west.

Q. Mr. Becker, when the river gets up on an alfalfa crop does it leave sediment, does the alfalfa gather the sediment? A. Yes, sir.

Q. Does that practically destroy or does it damage the alfalfa crop? A. No, sir.

Q. You think you can cut it just as well when it has left a lot of sediment, and washed the alfalfa down, as if it hadn't come along?

A. Well, if it don't wash it down it will make better alfalfa.

Q. Well, when the river gets to flowing over it does the alfalfa usually wash down or fall down?

A. It depends on the stage of the alfalfa. It will fall, yes.

Q. Well, this place where you live now, what kind of improvements did you have on this twenty-one-year place of yours? A. Well, I had good buildings on it.

Q. What were they? A. A house and barn.

Q. How big a house, how many rooms?

A. About a seven-room house.

Q. Frame— A. Yes, sir.

Q. —or stone or what?

A. No, sir. A frame building.

[fol. 598] [A]. What other building? A. A barn.

Q. How big a barn? A. About 30 by 40.

Q. What other buildings?

A. Meat house, and hen house, and machine shed.

Q. How big a machine shed?

A. I think about 20 by 24.

Q. Did you have any fences on your farm?

A. Yes, sir.

Q. What kind of fences? A. Wire netting.

Q. Woven wire? A. Yes, sir.

Q. Pretty costly, isn't it? A. Sir?

Q. Pretty costly, isn't? it?

A. What did that cost me?

Q. Yes, what did it cost you?

A. The fencing, you mean?

Q. Yes.

A. I don't remember just what it cost me.

Q. How many miles of it did you have on your 68 acres? A. Fences?

Q. Yes. A. Oh, probably a mile and a half.

Q. Was your place all fenced, all under fence?

A. No, sir.

Q. How much of it?

A. Oh, I think about 25 or 30 acres.

Q. What would you say was the fair, the cost of construction of your house?

A. Well, I have no idea. It was there when I moved there.

[fol. 599] Q. Well, give some idea. You know real estate values. You ought to know something about that. Give us your best guess. A. About $3,000.00.

Q. $3,000.00. What do you think the cost of building the machine shed was? A. About $200.00.

Q. And what was the cost of the barn?

A. About $800.00.

Q. And what is the cost of the meat house?

A. About $200.00.

Q. And what is the cost of the hen house?

A. About $150.00.

Q. Is that all of the buildings? You didn't have any more buildings there than that?

A. A few brooder houses.

Q. Brooder houses — chicken houses. You raised chickens? A. Yes.

Q. Your farm was 68 acres? A. 68.

Q. 60? A. 68.

Q. 68. And what did you say you got for your farm?

A. What I paid for it?

Q. Do you still own it? A. Yes, sir.

Q. What did you pay for it?

A. $200.00 an acre.

Q. That is $12,000.00 or $13,000.00? A. Yes.

[fol. 600] Q. Now, how often did you go down to this tract here?

A. Oh, maybe about once a year.

Q. You didn't see it more often than that?

A. Not much.

Q. No occasion for you to pay any particular attention to it? A. Yes, sir.

Q. What? A. The crop that was on it.

Q. The crop that was on it? A. Yes, sir.

Q. Why did you go down there once a year? To look at the crop?

A. I was a farm reporter on this Triple A Program. I had gone down there to check up on the place once in a while.

Q. That is what you did, you went there once a year to find out what you could about it. The Cunningham boys—you knew it for a good many years—were they farming it pretty well? A. Yes, sir.

Q. And yet you know that farm was sold for taxes, don't you? A. Yes, sir.

Q. That it had about $1,000.00—$800.00 worth of taxes against it that they did not pay?

A. I didn't know how much.

Q. And they couldn't find and didn't find anybody else [fol. 601] that would give more than $1,000.00 for it in 1939; you know that, don't you?

A. Yes, sir.

Q. Why didn't you go down there and buy that farm?

A. Because I wasn't financially able.

Q. And had a nice farm like you have?

Mr. Watson: That is all, I believe.

Mr. Gentry: That is all.

(Witness Edwin Becker excused)

[fol. 602] Arch Howell, a witness of lawful age, being duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:

Q. Mr. Howell, will you tell the Court your full name?

A. Mr. Arch Howell.

Q. Where do you live, Mr. Howell?

A. I live just above Defiance right now, about three-quarters of a mile.

Q. Where were you living in the summer and fall of 1940? A year ago last fall.

A. A year ago last fall. Well, up until, last spring I moved out of the TNT area and moved into the one house down in this bottom area down there. Then I stayed there and last spring—and from last spring I moved above Defiance.

Q. When did you move from the TNT area?

A. I couldn't give you the date.

Q. Well, you know they commenced operations in the fall?

A. Yes, sir. That is when I moved. I moved just after they signed the option.

Q. When you were living in the TNT area just where were you living?

[fol. 603] A. I was living in what is called the old Taylor place in the very upper end of the TNT area. That is out of the bottoms.

Q. How far was that from the 33⅓-acre tract Mr. Muschany had?

A. That place was cut in strips of 33, and this place was adjoining it; two 33½ strips between it and the Muschany tract.

Q. What I am getting at, did you live near one of these 33⅓-acre tracts? A. Yes.

Q. Up in the bottom?

A. Up in the main bottom. The other bottom was a little bit lower.

Q. Now, Mr. Howell, you were farming the Muschany tract, I believe?

A. Part of it only.

Q. Part of it only? A. I had the alfalfa.

Q. You had the alfalfa. How long had you had a crop on that 33-acre tract?

A. The crop of alfalfa is all I had. I plowed it in the fall of the year and sowed it next spring, and raised three crops, four crops that summer. Not counting the first one.

Q. If Mr. Muschany bought that land in the fall of 1939, as the evidence shows he did, were you cultivating it before he bought it or subsequent to it?

A. I wasn't cultivating that. I was cultivating Mr. Cunningham's beside it.

Q. Mr. Cunningham's side of it?

[fol. 604] Mr. Blanton: Mr. Cunningham's beside it.

Mr. Gentry: Beside it, yes.

Q. How long did you cultivate that?

A. I took it in the spring of 1936, I guess.

Q. As to this alfalfa crop which you—did you say you planted it in the fall of 1939 or the spring of 1940?

A. I plowed it up in the fall and sowed it in the spring. I don't remember the year. I got four crops off it that spring and the TNT took it the next.

Q. Do you know anything about the tonnage of the alfalfa you raised there per acre, how many tons to the acre you raised?

A. I couldn't give you that. I could probably give you the truck loads, but I don't know how much. We hauled about eight trucks to the cutting. The first cutting, I cut it to get the weeds clipped off, and it didn't amount to much, but the other three were good, high.

Q. Did you have it baled on your place?

A. No, sir. I hauled it [look] on the truck and put it in my barn.

Q. Did you see any corn raised on there?

A. Yes, corn raised right to the side, although I subrented the corn to another man.

Q. Do you know about the number of bushels of corn per acre raised?

[fol. 605] A. I couldn't tell you.

Q. Did you observe the corn crop in a way?

A. Yes, I did.

Q. Can you tell the Court how it compared to other crops in the neighborhood?

A. It raised as good corn as I did another row or two from it.

Q. Do you know anything about the flooding of that land; how many times, if at all, this Muschany property was flooded in the five years preceding 1940?

A. I raised five crops and never lost one, taking it from 1936, just a corn row away from him, just on the other side.

Q. Do you know anything about land values in that neighborhood? A. Yes, I do.

Q. How did you get your information about it?

A. Oh, land that has been sold, different places around there. I bought a farm myself in there last spring a year ago.

Q. Have you an opinion as to the reasonable market value, fair and reasonable value of this Muschany tract in the fall of 1940, in November and December, 1940?

Mr. Gentry: What are you nodding your head at me for?

Mr. Watson: Go ahead.

Mr. Gentry: You were sitting there, nodding. I didn't know what it was for.

Q. Will you tell the Court what your opinion is?

Mr. Watson: I object to that. The witness hasn't qualified.

[fol. 606] The Court: Sustained. Let him answer yes or no.

Q. Do you know what the value of it was in the fall of 1940? Don't give us a figure, but tell us whether or not you do know.

Mr. Watson: We object to that.

The Court: Overrule objection.

A. Answer?
Q. You may answer yes or no, you know it or don't know it? A. Yes.
Q. What, in your opinion, was the fair and reasonable market value of that Muschany tract of land in the fall of 1940?

Mr. Watson: We object to that because it is based on answer just made by the witness, and the question asked him was if he knew the value and not the market value.

Mr. Gentry: Fair market value is what I stated two or three times.

Mr. Watson: That wasn't asked him.

Q. I will embrace that in the question. What, in your opinion, was the fair market value in the fall of 1940?
A. $150.00.
Q. $150.00 for how much? A. An acre.

Mr. Gentry: You may examine.

Cross-Examination.

By Mr. Watson:

Q. Mr. Howell, how close do you say you lived to this property?

[fol. 607] A. Probably a mile and a half. I don't know exactly.

Q. Which way?

A. Right above Defiance. Up the river from it.

Q. How far do you live from Mr. Becker?

A. Probably a mile.

Q. A mile?

A. I judge. I don't know the distance exactly.

Q. Is his farm without the TNT area?

A. Mr. Becker's?

Q. Yes. A. No, sir.

Q. Now, you say that you farmed this land here, this Muschany tract?

A. Only the alfalfa.

Q. Only the alfalfa. And you say it is worth $150.00 an acre, the tract?

Mr. Gentry: Don't nod your head. Say yes or no.

A. Yes, sir.

Q. What do you say the land is worth for alfalfa purposes? A. $150.00 an acre.

Q. That is when it is raising alfalfa?

A. It always raised it, unless the river gets it.

Q. You don't say this in willow sprouts is worth $150.00 an acre?

A. No, I am not speaking of that.

Q. You are just speaking of the part that is in alfalfa?

A. Yes, sir.

[fol. 608] Q. This is right next to the Missouri River, isn't it?

A. This alfalfa? No, sir.

Q. I mean the tract? A. Yes, sir.

Q. And the Missouri River has a habit—how long have you lived along the Missouri River?

A. Practically all my life. I was born on it.

Q. You know as a fact that the river does cut on one side and swing in on the other quite a bit, doesn't it?

A. Yes, sir, where it is not paved.

Q. And you know as a matter of fact that the river has changed its stream or the river bed there quite a good deal, hasn't it? A. Certainly.

Q. In your experience. You know that the Cunninghams owned this tract before the present ownership, don't you?

A. I do. I rented from him.

Q. You rented from them? A. Five years.

Q. You know that on this land they were sued for taxes because they didn't pay the taxes on it, don't you?

A. Yes, sir.

Q. And they got a judgment against them in the St. Charles circuit court for taxes, didn't they?

A. I think they did.

Q. And you know that Mr. Karl Muschany and his wife bought this tract for $1,000.00, don't you?

A. No, sir.

[fol. 609] Q. In 1939?

A. No, sir. I don't know what they give.

Q. Well, if they did buy it at that, did you make any inquiry as to what this land could be bought at?

A. No, sir.

Q. In 1939? A. No, sir.

Q. And you lived within a mile or so of it?

A. I farmed it, and lived on it in the summer time.

Q. You didn't live on it. You worked on it. There wasn't any house on it.

A. I was in a house on the Cunningham land in the summer time.

Q. Not on this tract, the Callaway—or Muschany tract?

A. No, sir.

Q. And you let this property sell for $1,000.00, that you say it worth $4,500.00?

A. I didn't know what it sold for.

Q. And didn't make any inquiry to find out?

A. No, sir. I had all the land I could handle.

Q. How many acres have you?

A. I haven't any now.

Q. How many did you have?

A. 300, me and my brother together.

Q. You are in a suit now about your option? You want to be paid your option price, don't you? A. Yes.

[fol. 610] Q. How much is your option price?

A. $22,500.00, I think.

Mr. Watson: That is all.

Mr. Gentry: That is all.

(Witness Arch Howell excused)

(Walter J. Voelkerding.)

Mr. Gentry: May I put one more witness on that lives away out? It will only take five minutes. I won't insist.

The Court: That is all right.

[fol. 611] WALTER J. VOELKERDING, a witness of lawful age, being duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:

Q. Please tell us your full name?
A. Walter J. Voelkerding.
Q. Where do you live?
A. I live at Dutzow, Missouri, Warren County.
Q. How close to the St. Charles County line is that?
A. About two miles.
Q. What connection, if any, have you with the drainage district down there that has the great, big, long name to it?
A. I am attorney for Darst Bottoms Drainage and Protection District Number Two, St. Charles County, Missouri.
Q. Good. I don't see how you remembered it but you did.
Q. How long have you been attorney for it?
A. I think since 1938 or 1939.
Q. You are a lawyer? A. Yes, sir.
Q. And were admitted to the Bar how long?
A. In '23.
Q. And have practiced law to some extent? A. Yes.
Q. What other occupation have you?
A. I am also in the bank up there, banking business.

Q. What bank are you connected with?

[fol. 612] A. Bank of Dutzow.

Q. What is your position with the bank?

A. Executive vice-president in charge of loans.

Q. Is this Muschany tract of land of 33⅓ acres in this drainage district you spoke of? A. It is.

Q. How long have you been familiar with this Muschany tract of land?

A. When I became the attorney about 1938 or 1939.

Q. Have you been over that neighborhood?

A. I have.

Q. You are familiar with the land and land values?

A. Yes, sir.

Q. Have you had occasion to learn what farms sold for and what they were bought for in that vicinity?

A. I have.

Q. From your acquaintance with the drainage district and its business, and from your knowledge of farms in that community, are you able to tell us what that land was worth in November, 1940? Answer yes or no before you state the figures? A. Yes.

Q. What, in your opinion, was the fair and reasonable market value of that 33⅓-acre farm of Muschany?

A. Putting it on an acreage basis, $125.00 an acre.

Q. Averaging throughout?

A. I would average it at that.

[fol. 613] Q. Is some of it better than some of the rest of it? A. It is.

Q. Now, in regard to these taxes here, the taxes on that land I have here, can you explain that to the Court in regard to these drainage taxes Mr. Muschany mentioned in his testimony?

A. The district, I learned from the records the district was organized in 1926, and bond issue was floated for a total of $58,000.00, and the money was turned over to the Government for river improvement work. There is no drainage; it is all river protection work.

Q. Go ahead.

The records show it was turned over to the Government and the Government expended the money; and the

bond issue was floated, and over a period of twenty years this issue has to be paid, and every year one-twentieth part is collected by the collector and used to redeem the bonds.

Mr. Gentry: You may examine him.

Cross-Examination.

By Mr. Watson:

Q. Mr. Voelkerding, you live up at Dutzow?

A. That is right.

Q. Did you ever live—that is in St. Charles County, isn't it?

A. No, sir. It is in Warren County. Thank you.

Q. How far is that from the land here in question.

[fol. 614] A. Some twelve or fifteen miles. Maybe a few miles more.

Q. Now, this Muschany tract is located sort of back in a pocket? You go from the highway, you have to go up on a bluff to get across the river going north?

A. Let's say that again, Mr. Watson.

Q. Going north up Highway 61 you can't get to this farm without crossing the Missouri River, can you?

A. If you are talking about coming out from St. Louis, you would have come 61 at that time to 94, near Weldon Spring, right at the Miller School, and turn off to the left, going south.

Q. I understand, but will you please answer my question. In going north on 61 you can't get to this land without crossing the bridge across the Missouri River, can you? A. That is right.

Q. And then you are up on top of the bluff, aren't you?

A. That is right.

Q. And then you have to go a mile or so before you get onto a road that goes or used to go west from there?

A. Yes.

Q. And then you travel that road how far before you take off to the left, going to this property?

A. You pass from the Miller School—

Q. About how many miles?

A. Five or six, I would judge.

[fol. 615] Q. Then when you turn off how far do you go in the country roads and through the bottoms before you get to this tract?

A. You cross the railroad there and drop off—

Q. In miles?

A. I am trying to figure it out. To the Walnut Grove School. A mile and a half or two miles.

Q. When you get down there you have no fence to bother you, you can walk, and if it is muddy you go on back?

A. It is a county road and they are generally not fenced.

Q. No improvements on this tract?

A. That is right, no improvements on the Muschany tract.

Q. Have you ever been in there since the Government built the runways they built to keep out of the water?

A. No. I have no pass.

Q. You can't ford the Missouri River, getting over on the St. Louis County side, from this tract?

A. I am not a navigator. I never tried it.

Q. There is no ferry boat? A. Not there.

Q. No way to get the products from this ground out except the road you mentioned?

A. That is right.

Q. There are no fences on this tract so you could feed the products of it? A. Right.

Q. Now, you say you are attorney for the Darst Bottom Protective District Number Two? A. I am.

[fol. 616] Q. They had a lawsuit here, didn't they, with the Government?

A. I think the Government had one with it.

Q. Yes, but didn't you file an answer for them in that lawsuit? A. I did.

Q. That is Number 1,023? A. That is right.

Q. And you had an option with the Government on that tract, didn't you? A. That is right.

Q. And for how much? A. $3,900.00.

Q. How many acres in the tract?

Mr. Gentry: We object to that as a collateral matter entirely in the—

The Court: He may answer this question, how many acres in the tract.

A. Our survey or survey made by Mr. James Cleave showed 5.1 acres.

Q. 5.1 acres? A. That is right, Drake.

Q. You represented, you receded from your position in that?

A. We had to go to condemnation.

Q. You do represent, as a lawyer, some of the other people who hold options and are insisting on getting paid their pound of flesh, don't you?

A. In American dollars. To be paid in American dollars.

Q. You do, don't you? A. Yes.

Mr. Watson: That is all.

The Court: We will stop at this point. Adjourn Court until tomorrow morning at ten o'clock. (5:10 P. M., April 6, 1942)

[fol. 617] (Theodore Seib.)

Pursuant to adjournment, at 10:00 A. M., April 7, 1942, the following further proceedings were had:

The Court: You may proceed, Gentlemen, with the case on trial.

Mr. Gentry: Your Honor. Mr. Seib, come around, please.

Theodore Seib, a witness of lawful age, being duly produced, sworn and examined, testified in rebuttal on behalf of the defendants as follows:

Direct Examination

By Mr. Gentry:

Q. Mr. Seib, will you please state your full name?

A. Theodore Seib.

Q. That is spelled S-e-i-b? A. Yes, sir.

Q. I believe you are the father of Mrs. Vera Muschany who testified here yesterday, are you?

A. Yes. I never testified but I am the father.

Q. You are the father of Mrs. Vera Muschany, and consequently the father-in-law of James Karl Muschany?

A. Yes, sir.

Q. You live at Chesterfield, Missouri, do you?

A. Yes, sir.

Q. Are you in any business now, active business?

A. No, sir, not of my own.

[fol. 618] Q. You were, before you sold out to the Government or contracted to sell to the Government, you were running a store in connection with two men—where was that? A. At Hamburg.

Q. You are out of that business now? A. Yes, sir.

Q. Mr. Seib, how long have you lived in that general neighborhood, Hamburg, Defiance and all that part of the country?

A. I was born there in 1874, and lived there all my life, 67 years.

Q. Where was the particular place where you were born? A. Hamburg.

Q. In town or on a farm? A. In town.

Q. In the town of Hamburg? A. Yes, sir.

Q. In your life in that community there have you become acquainted with the farms down in the river bottom in the neighborhood of this land that belonged to your son-in-law and daughter? A. Yes, sir.

Q. Were you interested in an estate that owned some land down there?

A. Yes, sir, the Seib estate. My father owned land in the bottom.

Q. Where was the land he owned down there?

A. About half a mile from Walnut Grove School House.

Q. How close would that make it to the James Karl [fol. 619] Muschany tract involved here?

A. About a mile.

Q. Were you acquainted with the Karl Muschany tract in 1940 and years prior to that time? A. Yes, sir.

Q. You know the lay of the land, the kind of crops that have been raised on it and things of that sort?

A. Yes, sir.

Q. Have you become familiar and were you familiar in August and November, 1940, with the value of farm lands such as this Muschany tract and the Muschany tract itself at that time? A. Yes, sir.

Q. And are you able to tell us now what, in your opinion, was the fair and reasonable market value of that 33-acre tract of Karl Muschany in November and December, 1940? You may answer that by yes or no first.

A. Yes, sir.

Q. What, in your opinion, was the fair and reasonable market value of that piece of land in November and December, 1940?

A. Well, I can tell you that in the land that we sold in the fall of 1938.

Q. Well, aside from what you sold, what do you base it on? You have stated you have an opinion. Now will you give us your opinion as to the value of this particular piece of land? You may tell us aside, if you want to, how you arrive at your conclusion.

[fol. 620] A. I would value it at $125.00 an acre.

Q. Now, you started to tell us about some land you sold. Was that the land of your father's estate?

A. Yes, sir.

Q. How big a tract was that?

A. We always called it a 40-acre tract but when we had it surveyed it measured out 141. I mean 141 acres and a fraction. I forgot the fraction.

Q. Was that the place where you were born, as you described a while ago?

A. Oh, no. I was born in Hamburg.

Q. That is right. Where was this tract of your father's estate with reference to the Karl Muschany place?

A. It was located just a mile south of the Muschany or Cunningham tract of land.

Q. What was the nature of it as compared with the Karl Muschany tract as to fertility, the way it lay and all that sort of thing?

A. Well, it was, I guess, about the same fertility. It is just in the same bottom, of course. Our land was laying right along the county road. The county road run along on this 40 acres on the west side and all the way on the north side to the northeast corner, and from the northeast corner I judge it is about just a mile to where the Cunningham tract of land is, or the part that Muschany bought.

[fol. 621] Q. Now, you say you sold that estate about 1938?

A. Sold in the spring of 1938 and made final settlement of the estate in the fall of 1938.

Q. Was it sold at public or private sale?

A. Private sale.

Q. What did it bring per acre? A. $125.00.

Mr. Gentry: You may examine him.

Cross-Examination.

By Mr. Watson:

Q. Mr. Seib, who did you sell this tract to?

A. Doctor Heinrichs.

Q. How many acres in it?

A. A little over 41 acres.

Q. Did it have a house on it?

A. No, sir. It had a corn crib and a shed that we put hay in. A hay shed.

Q. Any other buildings?

A. No, sir; that is all there was on it. No fencing.

Q. Now, do you mean that the part of this Muschany tract that was in willows was worth $125.00 an acre?

A. I don't, no. There is very little of it in willows, if his land goes to where the Government survey is. That other is in the low land next to the river.

Q. I am asking you if some of it was in willows and the usual tree growth that was on that land.

[fol. 622] Mr. Gentry: The witness was trying to explain that some willows he spoke of were beyond the line.

Mr. Watson: I am not asking about those beyond the line.

Mr. Gentry: He was trying to locate the willows.

Q. Would you say that that in willows was worth $125.00 an acre?

A. No. I guess that wouldn't be worth quite that much; no.

Q. You were engaged in business at Hamburg in 1939?

A. Yes, sir.

Q. You knew that this tract here of 33⅓ acres was on the market in 1939, didn't you? A. No, sir, I did not.

Q. You didn't know that the taxes had not been paid on it and suit was brought on the property for sale to collect the taxes?

A. I never heard of it until Mr. Muschany told me about it, and I believe that was after he bought it or just had bargained for it, that is all.

Q. The map here, Government's Exhibit 1, look at that and the part marked there in red. The part marked in red with the figure 16 and J. K. Muschany, is that the tract as you recall it?

A. Yes. It lays alongside of Cunningham, next to the river.

Q. Next to the Missouri River? A. Yes, sir.

Q. Is that map a fair representation of the condition of [fol. 623] that tract?

Mr. Gentry: At what time?

Mr. Watson: As he knew it.

Mr. Gentry: What time? You mean when the map was made?

A. I know it is laying there but I couldn't tell you anything about this map according to what the land should be.

Q. Just point out any differences, if you know of any or see any there, with its condition in 1939 and what that map shows.

A. What does this part show? What should this be? I don't know anything about this map.

A. Well, I can't testify to what the map shows. I am asking you.

A. I don't know what this should represent.

Q. All right. Where is the tract that you sold, with reference to that, on the map?

A. I don't know whether it would be on this map. Right up in here somewhere, I guess. This should represent the Femme-Osage Creek, you think?

Q. That would be my idea, or some creek.

A. The county road runs from the school house. I don't know where the school house should be located on here. 94 comes down hill here, goes over to the Walnut Grove school. Take this road to the corner. This road goes in here, down to Lambert's and goes in here. That is the county road. [fol. 624] The land lays right in here.

Q. Where is the Shenegram tract sold to Mr. Karrenbrock?

A. Along the creek some place. It goes to the creek.

Q. Do you know that tract?

A. I know where it is laying. I have been on it once or twice.

Q. How many acres in it? A. I couldn't say.

Q. What kind of improvements? Any improvements on it?

A. A small house and a barn. I don't know exactly how good they are or anything about them. It is a house and barn. Cunningham has a little house setting on his tract there.

Q. You don't know how many acres in the Shenegram tract? A. No, I don't.

Q. Do you know about how many?

A. No. I imagine around 60 acres or more. I don't know.

Q. How many acres in cultivation on it?

A. I couldn't say that.

Mr. Gentry: Which farm are you inquiring about?

Q. The Shenegram farm. You don't know anything about that except what you have testified to?

A. No, I don't know anything about how many acres.

Q. If that farm sold in 1940, in March, 1940, for $50.00 an acre, what would you say would be the value of the tract here in question based on that?

Mr. Gentry: If Your Honor please.

[fol. 625] A. At a private sale?

Mr. Gentry: That is not a proper question. It isn't proper to base it on one tract alone sold at a different time. We don't know the circumstances under which it was sold?

The Court: Overrule objection.

Mr. Gentry: I think he has a right to take other things into consideration. The question limits him, basing his answer on one thing.

The Court: The witness may answer if he can.

A. I don't know. I couldn't say. I know on the Shenegram tract where the house stands just on the back a slough is there and when the river comes up it backs up Femme-Osage Creek, comes in this slough and floods the land in this low place before it floods the rest of the land.

Q. Don't you see the slough on this map in question?
A. It don't run out there.
Q. The picture is wrong?
A. I don't know. The slough runs on the edge of this corner.
Q. Would you say this aerial picture is right or wrong with reference to the location of that slough and this tract of land?
A. Well, I couldn't say that, no.
Q. What would you say as compared with the value of the Shenegram tract and this tract, the Shenegram tract, having improvements on it and this tract not?

[fol. 626] Mr. Blanton: Per acre, you mean.

Q. Yes, per acre.
A. The Shenegram tract, that is good, fertile land, and that in the slough is what you call black stick.
Q. I am asking you what you would say would be the comparative value per acre of the two tracts in 1939 and 1940.
A. The upland here on this Shenegram tract would be valued about the same as that of Cunningham.
Q. I am asking you tract for tract, now, taking into consideration the Shenegram tract and taking into consideration the Muschany tract, except that one has greater acreage than the other, what would you say would be the comparative value of the two tracts per acre?
A. Well, I judge they ought to be about the same because they are right there.
Q. Don't you know as a fact that the Shenegram tract was bought by Mr. Karrenbrock in 1940?
A. I know he bought it from Mr. Shenegram, yes.
Q. And he bought it in March, 1940, or about that time?
A. I guess it was. I don't know exactly.
Q. And he paid, he bought it subject to a deed of trust with an unpaid balance of $2,250.00, didn't he?
A. No, sir. I wouldn't know whether he owed anything on it.
Q. And he paid according to the revenue stamp or facts $2,500.00, or not over $2,500.00, for the equity?

[fol. 627] Mr. Blanton: Plus the other.

Q. For the equity?

A. I don't know anything about the transaction, what he paid for it or anything.

Q. You made no effort to find out about that tract?

A. No. I didn't have occasion to.

Q. There were 80 acres in the Shenegram tract, weren't there? A. I don't know.

Q. You don't even know how many acres in it?

A. No, sir, I do not.

Q. Now, look again at this Muschany tract and tell me, tell the Court, if you can, whether this picture is a fair representation of this tract at the time you speak of.

A. I can't say anything about the picture. Only I can explain the land when I was on it. The land from here on until out to what we call the river edge there, that there is nearly level until it gets to this corner, and then there is an offset there, low land, a slough, and then it gets a little higher out here, but how much land is on the Muschany tract I couldn't say, or how much belongs on out toward the river. I don't know whether this land calls for river's edge.

Q. Now, Mr. Seib, if your lighter color shown on this map is cleared ground, and the darker is not cleared, tell the Court whether that is a fair representation of the condition of this tract at the time you speak of.

Mr. Gentry: Which time? Is that 1940 you are talking [fol. 628] about?

Mr. Watson: Yes, sir, 1939 and 1940.

A. Well, I know that it was nearly all cleared, that is all I can say about it.

Q. Will you please make your replies with reference to the map here that you have before you?

A. Well, the way the map shows, if this should be willows to up here it looks to me like they have too much willow land on there, because I know there is more land than this cleared in order to have 32 acres or whatever it may be.

Q. Well, there are 33⅓ acres in the tract? A. Yes.

Q. Don't you know as a matter of fact that the north end of this tract and the south end, or at least the north end is a good deal lower than the part up where the willows are?

A. I don't know that, no.

Q. Do you say it is not?

A. I don't know. I don't know. I would not say whether it is or is not.

Q. You have never been down there?

A. I have only been over that once or twice in the last year or such.

Q. What you know about it is what you saw in the one or two times you have seen it in the last several years; is that right?

A. Yes, sir.

[fol. 629] Q. Now, Mr. Seib, if that land sold in 1939 for $1,000.00, and had been sued on for collection of taxes, that, of course, was in the circuit court of the county, wasn't it? A. Yes, sir.

Q. You—don't you think that the owners were trying to sell part of that land to pay off the taxes?

Mr. Gentry: I object to a supposition.

Q. Or do you know that?

Mr. Watson: I am asking if he knows it.

The Court: Overrule the objection to the present question.

A. How was that question, Judge?

Q. Don't you know that the Cunninghams were trying to sell this land or part of it in 1939 so they could pay off their taxes and save it from being sold for taxes?

A. As I stated before, I don't know anything about it until my son-in-law said he was on a deal for that land. That is the first I heard of it.

Q. You know the Cunninghams? A. Yes, sir.

Q. And have known them for years?

A. Yes, sir.

Q. They traded at your store? A. Some, yes, sir.

Q. If this land is worth what you say it is, don't [fol. 630] you think they could have gotten more than $1,000.00 for this tract in 1939?

Mr. Gentry: I object to that as calling for a guess about it, Your Honor.

The Court: Sustain the objection.

Q. Do you take into consideration the fact that the land did not sell for more than a $1,000.00 in 1939 in arriving at your present estimate of the value on it?

A. Well, I couldn't say what kind of a deal or why they had to sell it.

Q. Do you take that into consideration?

A. I don't exactly understand what you mean, sir.

Q. I don't know how to make it any plainer. Are you taking into consideration the fact that it sold for $1,000.00 in 1939 when you say now that it was worth $125.00 an acre in 1940?

A. I say it was worth more than that. No doubt if it had been put up in court and people knew it it would have brought more. I don't know.

Q. You think this was a secret sale; that they didn't try to sell it to anybody?

A. I couldn't say that either.

Q. You have stated you thought the land in willows wasn't worth that. You are limiting your statement of value to the part not in willows; is that right or wrong?

A. Yes, sir.

[fol. 631] Q. Do you mean that is right, that you are so limiting it?

A. I claim all of the land that is in cultivation, yes, is worth 125.

Q. Notwithstanding the Shenegram tract sold for about 60 in 1940?

A. I couldn't say what it brought, no.

Q. If it did sell for 60 you still say this one is worth 125? A. Yes, sir.

Q. This one lays right on the river, doesn't it?

A. Yes, sir.

Q. And it is back in a pocket there where they can't get out to the market except by going across the bottom land and up the bluff or hill; that is right, isn't it?

A. Now you couldn't get to it at all.

Q. I am talking about as of that date?

A. No, sir.

Q. You had to get out of the bottom on the hill, didn't you? A. Yes, sir.

Q. And that always has been true. Now, do you take into consideration, in arriving at the value you have stated,

the fact that the Government TNT plant was established or was about to be established?

A. Yes, the Government established there, said it was going to take it.

Q. You have that in your mind, that that was to be [fol. 632] done, in fixing this value? Do you or do you not? A. Oh, no. No, sir.

Q. You have been, up until the establishment of this TNT plant, in business, you say, at Hamburg?

A. Yes, sir.

Q. Which is two or three miles away? A. Yes, sir.

Q. You have an option which is in suit at this time with the Government on your property, don't you?

A. In suit?

Q. Yes, in another lawsuit? A. No, sir.

Q. The Government is condemning your property?

A. We had a settlement with the Government for my property.

Q. Your store property? A. Yes, sir.

Q. You have been paid off? A. Yes, sir.

Q. And you were paid, in addition to the land you were paid $1,000.00 for unearned salary, weren't you?

Mr. Gentry: That I object to because it is going into a collateral issue and has no bearing on this case.

Mr. Blanton: It shows his interest.

Mr. Gentry: There is no interest pending.

The Court: I think the pendency of the matter might show his interest, but I don't think we are concerned with the terms.

[fol. 633] Mr. Gentry: He said he has been paid off.

The Court: He still might have an interest one way or another in maintaining these options. We overrule the objection.

Q. You are interested in what is known as Q. W. S. S. tract, aren't you?

A. No, sir. I have no interest in that whatever.

Q. How about suit 998, Theodore Seib? You haven't settled that one, have you?

A. No, sir. I don't own any other land; no other property whatever.

Q. You have no suit pending between you and the Government with reference to land in the TNT area?

A. No, sir. I have no land.

Q. You have no land. But now if this was overflow land, and overflowed about once every year and a half, would you still say it was of the fair value of $125.00 an acre?

A. Yes, sir. The way the farmers figure out there they can stand two overflows out of every five and still come out ahead.

Q. I didn't ask what they figure.

Mr. Gentry: I think he has a right to explain the grounds for his opinion.

Mr. Watson: Well, he has done it.

The Court: Sustain the objection.

[fol. 634] Q. You say it is of that value notwithstanding the Shenegram tract sold for $60.00? A. Yes, sir.

Q. Don't you know, Mr. Seib, that this tract in suit, as well as the other land, and all of the other land in the river bottom, between the river and the bluff, was under water last year for several feet deep?

A. I understand it was. I never saw it. Yes.

Mr. Watson: That is all.

Redirect Examination.

By Mr. Gentry:

Q. Just a moment. Did that Shenegram tract you speak of overflow also?

A. The slough land, yes. [Id] did this last fall.

Q. Did the piece of land you described here that you sold in 1938 overflow also? A. No, sir.

Q. Did the lands down there generally overflow?

A. Well the land, what we call the Cunningham land and that there where the TNT have all their wells, that was all under water, I understand. I wasn't down there.

Mr. Gentry: That is all.

Recross Examination.

By Mr. Watson:

Q. Mr. Seib, are you basing your valuation of this land on the status that it was people that owned the land, that didn't want to sell and didn't have to sell it?

[fol. 635] A. Yes, sir. I think that is what it was worth whether they wanted to sell it.

Q. I am asking if you are basing it on the theory they didn't want to sell it and didn't have to sell it?

A. Yes, sir, I would say that.

Q. In other words, what you have said about the property is, here is a man that has some property and he didn't want to sell it, and, no matter what somebody wanted to buy it from him for, that if he didn't want to sell it it was worth $125.00 an acre; is that right? A. Yes, sir.

Mr. Watson: That is all.

Redirect Examination.

By Mr. Gentry:

Q. You were asked, Mr. Seib, what was the fair and reasonable market value of that property and you answered $125.00 an acre. Now, which is your correct answer?

Mr. Blanton: I think in fairness to the witness Mr. Gentry ought to tell the witness what he understands is fair market value. We object to the form of the question unless that is incorporated in the question, in view of the answer he just gave Mr. Watson.

Q. Well, assume now that we mean by that question [fol. 636] that a man has a piece of land which he is willing to sell for what was fair and reasonable according to market prices, and a purchaser comes along who is willing to pay what is fair and reasonable according to market prices. Now, was it on such a basis or not?

Mr. Blanton: We object to that because that doesn't incorporate all the elements of fair market value.

Mr. Gentry: I think it does, Your Honor.

Mr. Blanton: He omitted the element of compulsion from both vendor and vendee.

The Court: Sustain the objection. We are getting quite technical though.

Mr. Gentry: I think so, Your Honor. I think we need a dictionary.

The Court: Yes, we do, a law dictionary.

Q. Now, let me state it again: By fair and reasonable market value I mean to ask you what was the value of the land, assuming that the owner had the land and was willing to sell it for a fair price.

Mr. Blanton: But didn't have to sell it. If I might make objection, that is what I am objecting to, your failure to include that element.

Mr. Gentry: In fair market price I don't think I have to state that.

Mr. Blanton: You are begging the question.

[fol. 637] Mr. Gentry: You won't let me finish.

Mr. Blanton: Go ahead. I am going to renew my objection.

Q. And a purchaser comes along and wants to buy. Assume there is no compulsion to sell, the man can sell as he pleases; in other words, take out of consideration this TNT plant as though it was never thought of. Tell us the fair and reasonable market value. A man willing to buy and another not obliged to sell and wanted to get a fair and reasonable value. Is that what you mean?

A. Yes, sir.

Mr. Watson: We object, Your Honor.

Mr. Gentry: The objection comes too late; he has already answered.

The Court: Overrule objection.

(Witness Theodore Seib excused).

[fol. 638] James Karl Muschany, a defendant, having been previously duly produced, sworn and examined on behalf of the plaintiff, was recalled and testified in rebuttal on behalf of the defendants as follows:

Direct Examination.

By Mr. Gentry:

Q. Mr. Muschany, in view of the various estimates of acreage for alfalfa, corn and for willows on that piece of

property involved in this suit, I wish you would tell the Court, if you know, how many acres were in corn, how many acres were in alfalfa and how many acres were in willows in the fall of 1940.

A. In the fall of 1940. Well, we estimated—I say estimated because we didn't measure the land.

Q. Your very best judgment I want to know.

A. I base that on the seed we bought and the wheat acreage they had previous to that time. We estimated 12 acres of alfalfa and 12 or 13 in corn.

Q. That would be 24 or 25?

A. No. It would be more than 12 or 13 because I had cleared three or four acres. That would be added to make 28 or 30 acres. I make the statement 28 or 30 because I [fol. 639] don't know which it was, but that is a very close figure. Could I make an explanation why there were not more cornstalks from the previous year on this tract?

Q. I wish you would.

A. There is a well erected by the Government, not a well you are prone to think of—I am told this one measures 30' in diameter at the bottom, and there has been a large concrete building put over it—that they have there. In the course of time or erection of that they must have moved those cornstalks. When I was there they had a hard surface road through that cornfield. Naturally, if you passed the place at that time you wouldn't have seen cornstalks, so I can understand the witnesses saying there wasn't that much corn.

Q. Now, with reference to the willows, all of the willows seen between the middle of that land and the river, are some of them beyond your land?

A. The willows were only on one corner of it. There were willows there other than on my land, out next to the river. If you would stand and gaze out over the corner of my land you would see considerable willows that were not on my land. Unless you went out there and located that iron post, you couldn't say it was 12 or 13 acres of willows of mine.

Q. To your best judgment what was the acreage in willows when you made this contract with the Government in 1940 on your land?

[fol. 640] A. I would say about 3 or 3½ acres, because we had the other in cultivation.

Q. Now, Mr. Muschany, I didn't ask you when you were on the stand before and I want to ask you now: Are you familiar by reason of your long residence in that area—you have lived there all your life?

A. Yes, sir, that is correct.

Q. Around Howell, and up to the time this area was fenced off? A. Yes, sir.

Q. Are you familiar, by reason of your long acquaintance there with the people and land and the history of that part, your acquaintance with it, with the fair market value of land in that valley near where your land was located?

A. I think I am. I am not an expert, of course. I know the people and I know that bottom. I have been down there many times hunting.

Q. Do you know about sales?

A. I made an investigation.

Q. Now, what is your opinion, Mr. Muschany, as to the fair and reasonable market value of that land of yours, the acreage, taking it straight through, the average value per acre for the entire 33⅓-acre tract, leaving out of consideration the fact that a TNT plant was about to be erected, that the Government was acquiring the land, and [fol. 641] all that sort of thing? Just give us what you consider to be the fair and reasonable market value, assuming an owner that was willing to sell for a fair price but not obliged to sell and a purchaser that was willing to buy but not obliged to buy, and they were trying to arrive at the fair and reasonable market value. What is your answer?

A. For the entire tract it was worth $150.00 an acre for the 33⅓ acres.

Mr. Gentry: You may cross examine him.

Cross-Examination.

By Mr. Blanton:

Q. Mr. Muschany, you say there are about three acres of this land in willows?

A. That is my estimate. It might be three and one-half.

Q. You are referring to the slough on the land where the willows grow?

A. The willows were in the slough and that slough cut directly across the corner, like taking this book right across here. By the way, I heard mention made that the south part was the highest part. Where the willows was was the lowest part.

Q. Looking at Government's Exhibit 1, this light line across there, that is the slough, isn't it?

A. That is a very old map.

[fol. 642] Q. That is 1937, isn't it? That isn't so old.

A. I would say it was in regard to what I had done to the land, the clearing of it.

Q. The slough remained the same, does it, Mr. Muschany?

A. Yes. We didn't move that. There isn't any timber here now.

Q. The timber is between the slough and the river's edge?

A. There are some willows there. Let me look a moment.

Q. This slough enters your property at about the southwest corner and angles from the southwest to a northeast direction and comes out about the middle of your 33-acre parcel, and empties into the river?

A. It isn't my impression it goes that far down. Those red lines may be accurate. I am not saying they are not accurate but they don't seem to be in the right place, because the slough didn't appear to me to be half-way across there.

Q. Bearing in mind this is a 1937 map.

A. That doesn't make any difference.

Q. It wouldn't change the location of the slough?

A. No.

Q. But as a matter of fact when that Darst River Drainage Bottom tract of land was surveyed it was surveyed as a little more than five acres, and now less than half an acre?

[fol. 643] A. Wait a minute. May I make a statement?

Q. Yes.

A. The Government brought large machinery in here and tore this bank away and straightened it so it wouldn't be curved. Part of it they caused to be eaten away so they could have a straight bank.

Q. It is paved about on the edge of your land. In the middle of your land it is right on the river's bank, isn't it? A. My land?

Q. Yes, sir.

A. There is some discussion about right-of-way to the river. There isn't any right-of-way on my land to the river.

I believe there is some sixty feet. I am not prepared to state.

Q. This revetment work we are speaking about, it is not a paved road?

A. The bank is paved. It is a gradual slope and heavy rock to a depth of several feet or more so the water will not wash the land away.

Q. These wells you say the Government erected on this land, I will ask you if those wells aren't raised to an elevation of 10 or 12 feet above the level of the land all through that bottom?

A. I saw this one well on my land. It was no great height, probably six or eight feet, I don't know.

[fol. 644] Q. I thought these runways, these catwalks, that ran from the bluff, there were several of those?

A. I saw one of those catwalks at the end of my land. I don't remember the location of those other wells but they were there.

Q. In comparison with this portion of the court room inside the rail how big was one of those wells?

A. You mean the concrete work around?

Q. Yes, sir. From the base of the ground on up?

A. I would judge it was the size of this court room, but in the [court] of the concrete being put it—if they hadn't needed that they wouldn't have paved a road to it—they destroyed the cornstalks, they couldn't help it.

Q. I am not asking you that.

A. I said it was about as big as this court room.

Q. How close did you get to that?

A. We got out and inspected the alfalfa, and drove up this road and around the river bank to examine the paving or revetment work. We were close to it. I don't remember whether it was twice the distance of this court room.

Q. I will ask you if the well wasn't about the size from here to the corner of this court room at the base?

A. That wasn't my impression. Probably it is smaller. I didn't know that would be a point of issue. I only pointed that out to show the cornstalks were destroyed and [fol. 645] the people that examined that didn't see the corn.

Q. I will ask you if all of that bottom land didn't get under water at least three or four feet over the entire bottom, and if the water mark didn't show on the wooden sup-

ports of this catwalk, all over that bottom last October and November?

A. You mentioned the figure three or four. What do you mean by that?

Q. Three or four feet above the level of the ground, that much high over that entire bottom.

A. My witness testified yesterday—

Q. I am not asking about your witness. I am asking what you saw.

A. I didn't see water over that bottom. I wasn't permitted down there.

Q. You didn't go down there?

A. They wouldn't permit it. I would have gone under pain of death if I went down there.

Q. You don't know how high the water was down there?

A. I will say this—

Q. Answer the question.

A. To answer that question would I have to measure it?

Q. Mr. Muschany, you are an intelligent man. You understand my question. Can't you say you do know or don't know how deep the water was there?

A. Might I explain what I know? Can I answer the question?

The Court: Well, I don't know. It seems to me it calls [fol. 646] for a straight answer. Answer yes or no, and if you want to explain go ahead. You either know or do not know.

A. I will say yes, and I will explain.

The Court: All right.

Q. You say you know how deep the water was. How deep was it?

A. I had occasion to be in our truck and move some furniture on our bluff above this land and was very much interested in the high water because I lived in St. Louis County and observed it over the bottoms as the farmers were scared on both sides of the river, and I was interested in the high water, and when I moved this furniture for Mr. Brown, Chief Engineer in charge of the TNT project, I looked over the bottom and I recognized my alfalfa field and saw the alfalfa sticking out of the water.

Q. That was the one time you were there?

A. Yes, sir.

Q. You don't know whether the water had been higher on some other occasion?

A. I had occasion twice a day to pass the Missouri River and observe it closely purely as a matter of interest only, not thinking about that.

Q. How far from the Daniel Boone Bridge is your land located down the river, or up the river I should say?

A. You mean by roadway, of course?

Q. By riverway.

[fol. 647] A. By riverway. Well, let's see. That is rather a hard question. The bridge is in plain view. I would say it is an estimate of three miles.

Q. You could see your alfalfa from the bridge?

A. You misunderstood me, Mr. Blanton.

Q. No, I didn't misunderstand you. I asked if you could see that alfalfa from the bridge?

A. No, sir.

Mr. Gentry: He said he saw it from the bluff.

Mr. Blanton: I heard what he said, and I asked him the second question.

Q. This land Mr. Karrenbrock bought in March, 1940, do you know what the acreage of that land was?

A. No, sir.

Q. Do you know it was about 80 acres?

A. I said I didn't know the acreage.

Q. Do you know whether it had any improvements on it?

A. I had seen that dwelling, and it wasn't a very good one.

Q. Well, it was better than the one you had on your place? You didn't have one at all, did you?

A. It must have been better.

Q. I will ask you if that Karrenbrock land isn't four or five feet higher on the whole than the land you bought from Mr. Cunningham?

A. I think some of it is lower. I am not familiar with [fol. 648] that land to the extent to say what part is under water and what isn't, because I wasn't interested in it.

Q. Did you make inquiry as to what that land sold for in March, 1940?

A. No, sir, I didn't make inquiry.

Q. What land in the bottom did you make inquiry about when you said you learned about the sale of some of that land?

A. I did hear remarks in my store, and I would like to consult my counsel in regard to that before I state.

Q. You don't need to consult your counsel. Answer my question.

A. What was the question?

(Last question repeated by the reporter.)

Q. —when you fixed the value on your property at $150.00 an acre for the whole 33⅓ acres?

A. I know of one tract that sold for $200.00 back a number of years.

Q. That was twenty years ago at the peak price. Is that the Becker land you are talking about?

A. Well, coming up to present prices, my father-in-law testified he sold land at $125.00 an acre. Mr. Charlie Larimore, of Augusta, Missouri, would be here today if it wasn't for illness, and testify he paid $125.00 an acre for land in the Darst Bottoms Drainage District Number Two.

Q. Where was that land located?

A. It was probably a mile from my land. I didn't think [fol. 649] I would be called to answer that question.

Q. What improvements are on it?

A. None whatsoever except the rich bottom land.

Q. How big a tract was that?

A. In some of my papers I have it. It was between 40 and 100 acres.

Q. How do you know what was the consideration?

A. Because a farmer told me. I went to see Mr. Larimore, drove sixty miles to find out and he told me.

Q. You knew that when you paid Cunningham $1,000.00 for this 33 acres which you now say is worth $4,999.50, didn't you?

A. No. I said that was sold last fall. I thought you were trying to say what property had been sold for there recently.

Q. You didn't take advantage of Mr. Cunningham?

A. Modesty might prevent me from speaking, but I think I did.

Q. In other words, you took advantage of his necessities when you paid him $1,000.00?

A. I think I might have got that land for $800.00, but I gave him $200.00 more because I knew it was worth more. If I hadn't bought that land—

Q. If you hadn't bought that someone else would?

A. Certainly. Shall I make this statement at this time? It has been, I won't say erroneously, but there has been [fol. 650] misstatements made in regard to the sale of that land. That was not a court sale. I bought it from Cunningham.

Mr. Blanton: I didn't say it was a court sale.

Mr. Gentry: Yes. I beg your pardon. Mr. Watson got Arch Howell to say there was a judgment rendered for taxes and it was sold for taxes.

Mr. Blanton: There was a judgment, but he never said it was sold for taxes.

Mr. Gentry: He gave the impression, certainly.

Q. I will ask you if Cunningham asked for more than $1,000.00 price for this land when he sold it to you?

A. He didn't ask, no, sir.

Q. And you didn't offer him more?

A. No, sir.

Q. Are you putting the same measure of damages on this land when you are now valuing it at $150.00 an acre? Are you going to take advantage of the Government at that price, like you did of Mr. Cunningham?

A. I am not taking advantage of anybody.

Mr. Blanton: That is all.

A. The land is worth it.

Redirect Examination.

By Mr. Gentry:

Q. You learned from Mr. Cunningham that he wanted [fol. 651] to sell the land, did you?

A. Yes, sir.

Q. And you learned there were $800.00 taxes on it that he couldn't pay?

A. Yes, sir.

Q. And you knew he had to sell it to somebody?

A. Yes, sir.

Q. And did you not consider that was a bargain?

A. I considered it very much of a bargain. I didn't let it be known I was about to buy it.

Q. How much timber did you cause to be cut off that ground, yourself, since you bought it, aside from that thicket in the roadway?

A. Three or four acres.

Mr. Gentry: That is all.

The Court: Did the witness say he could see the bridge from his ground, from his tract?

Mr. Gentry: No, sir, I don't think he did. Explain that to the Court.

A. No, Your Honor, I didn't say that. I said I had occasion to move a truck load of furniture to Mr. Brown's home on the bluff. My land lays about a quarter of a mile, but with the water up there I could recognize all of the tract, and stood on the hill and recognized my tract. I often looked out there when the water wasn't up. It was a beautiful sight.

[fol. 652] Q. Was that place from which you moved Mr. Brown's furniture in the fenced area?

A. Yes, indeed.

Q. You went in and got the furniture and moved it somewhere else?

A. No. I took the furniture in there for their home.

Q. Did you say you could see your land from the bridge or not?

A. No, sir. He asked me how far was it from the bridge up the river to my land. I told him three miles. I didn't say I saw my alfalfa.

The Court: Standing on your tract can you see the Daniel Boone Bridge on a bright, sunshiny day?

A. Yes, sir.

Mr. Gentry: That is all. Defendants rest.

(Witness J. K. Muschany excused).

(Defendants Rest).

[fol. 653] (Testimony for Plaintiff in Sur-rebuttal.)

Mr. Watson: Mr. Harvey, take the stand again, will you, please?

Thereupon, the plaintiff, through its counsel, introduced the following further evidence on its behalf in sur-rebuttal:

S. C. Harvey, a witness of lawful age, who was previously duly produced, sworn and examined and testified on behalf of the plaintiff, was recalled and further testified on behalf of the plaintiff in sur-rebuttal as follows:

Direct Examination.

By Mr. Watson:

Q. Mr. Harvey, you have testified before in this case here?

A. Yes, sir.

Q. Tell the Court whether you saw the land here in question, that river bottom land, under water, or evidence of having been under water, and when?

A. In November, when we finally went down.

Q. November of what year?

A. November, 1941. That was the second or third time we had been down to the bottom to get on the property, and at that time the water had receded, but in coming down the road, from the river and to this property, from [fol. 654] the bridge to the Femme-Osage, they have a catwalk running out to this pump house, and there was evidence of the receding water, it had left marks on the catwalk posts, varying from 3 feet to 6 or 8 feet, depending on the topography of the ground. On this particular property it ran about 3 feet on most of it.

Q. You could see on the posts on this property in suit that the water had been about 3 feet higher than the land?

A. That is right.

Q. And in other places over the bottom it got 6 or 8 feet high, or 9, or how high?

A. Well, there was one low place I noticed the water mark on there was probably the height of the car or more as we drove along. That was not on this property. Probably on Cunningham's property.

Q. You say this was the third time you tried to get into the bottom; you had been there twice before and couldn't get into the bottom?

A. The water had receded. It was so muddy we couldn't get into it and waited until it dried up.

Q. How much time elapsed between your first trip and the third one when you finally got in?

A. Well, it seems to me it was probably a week or more.

Q. Now, tell the Court what investigation you made as [fol. 655] to the sale of the Shenegram tract to Mr. Karrenbrock. First, state the location of it with reference to this tract.

A. Well, the Shenegram property is about a forty to the north and to the west, or maybe a sixty say, of the Muschany property. It would lay a little to the west and to the north.

Q. There is a sixty-acre tract in between them?

A. Two thirty-threes. Maybe 60 or 80 acres lay in between them.

Q. It would be a quarter of a mile or something like that from him?

Mr. Blanton: You might have him locate it on this map.

Q. This would be north as I understand it.

A. You mean across the Muschany property. I walked across the Lambert property here and over toward the Shenegram property up to the line which would be at about this point here.

Q. Just indicate to the Court.

Mr. Blanton: Mark with a pencil on that plat.

A. This, as I remember, should be the Shenegram property located in here about like this. It may have taken in this field here. I walked across here to the Marchmeyer property, to this point down on the river. The [fol. 656] Shenegram property should be about here. They don't go quite to this Femme-Osage Creek. They are back a short piece from that, I think. This would be the Muschany property, Cunningham, Theodore Rassieur, Marchmeyer property here, and Muschany property here.

Q. Now, you made some investigation as to the sale of the Shenegram property. When was that sold?

A. I went to the recorder's office in the City of St. Charles at the court house and looked in book 177, page—

this is blurred—I think it is 309 or 509. At that page there is a conveyance recorded by Benjamin J. Shenegram and wife to C. R. Karrenbrock, dated March 7, 1940. That recites a consideration of $100.00 and other valuable considerations, with an indication of two and one-half dollars in revenue stamps attached, and conveys a tract of land, survey 1670, township 45, range 2 east, in which they conveyed this approximately 80 acres. Then at the bottom of the recording is a notation that is subject, was subject to a balance on original deed of trust. $4,000.00, the original amount was, and it recited the unpaid balance was $2,250.00. Now, that deed of trust, the reference in the record was, was given to T. G. Metler, Trustee, for Charles Keller and wife. That deed of trust is recorded in book 185, page 582. That is the reference in the record.

Q. That was this tract of land you just testified to?

[fol. 657] A. Yes, sir, conveyed by Benjamin Shenegram to C. R. Karrenbrock.

Q. What would that make the total consideration in the deed there that you have testified to?

A. Well, according to the revenue stamps the cash consideration couldn't have been over $2,500.00. It had to be $2,500.00 or less, plus $2,250.00 balance on the $4,000.00 deed.

Q. Not over $4,750.00?

A. It had to be that or less.

Q. It could have been down, too?

A. Anywhere between $1.00 and $500.00 less.

Q. Now, the Shenegram tract, tell the Court how it compared in quality with the tract here in question.

A. Well, this Cunningham property and the Muschany property and the Shenegram property and the Stewart property and the Marchmeyer property are all in this one little location, and the topography is very similar on all of them. They have bottom land and the land is fertile land, all of it. This Shenegram property, while it slopes off to the Femme-Osage on the north, there is a drainage that comes around to the east and runs around and follows this back to the Femme-Osage. I think that drainage would run right from the southwest to northeast through the Cunningham property and back in and follows around to the Femme-Osage.

Q. Well, just tell the Court whether in your opinion the [fol. 658] Shenegram property was of the same general quality and character and value per acre as the tract in suit.

A. Well, I think the Shenegram property was worth as much or more than the Muschany property was.

Q. Did the Shenegram property have any improvements on it?

A. If they did I think they had been destroyed at the time we were down there.

Q. You are placing your value on it as land without improvements?

A. Yes, sir.

Q. Mr. Harvey, I believe you have stated you have been in the real estate business for a great many years. You are also connected with some organization with reference to land values, aren't you?

A. Well, we were members of the National Association of the Real Estate Board.

Q. That is what I meant.

A. I was an officer and director in it for sixteen or seventeen years, and was president in 1930.

Q. Now, just state the functions of that organization. What do they do, and what is their purpose?

A. Well, it is an association of real estate members throughout the United States, which embraces not only the brokerage business but the financial end of it and the appraisal end of it. It covers all fields in connection with real estate business.

[fol. 659] Q. In the course of your activities in that respect you familiarized yourself with land appraisals and values not only in this section but spreading over a wide territory; is that true?

A. Yes, sir. I happen to be one of the national committeemen on taxation for the National Association.

Q. What would you say was the comparative value of real estate, farm lands, just after the last war? Give the history of the value of lands generally, farm lands, from the time shortly after the last war on up to the present time.

Mr. Gentry: If Your Honor please, in the first place I submit that certainly is not in rebuttal of anything, in

the second place it is going back nearly twenty-five years and certainly can't throw light on the value of Mr. Muschany's land, and that is what is being tried.

Mr. Watson: Witness Becker testified he bought a tract 21 years ago, one of their witnesses. Now we are asking for this testimony with reference to that.

Mr. Gentry: You brought that on with your examination, I think.

Mr. Watson: The witness testified to it.

The Court: Overrule the objection.

Q. Did land generally reach its peak about 1940 or 1921 or thereabouts in price?

[fol. 660] A. It started along that time. It started really about 1921 or 1922 and advanced along until about '25.

Q. What has been its course since then?

A. Well, the graph from the National Association of the Real Estate Board shows it tapered off from the latter part of 1925 to a point in 1929 when it made a decided dip, and values then fell down as a general thing about 40%.

Q. And what has it done since then?

A. There has been a recovery, generally speaking, where you don't have any special reasons for an increase, of about 25% throughout the United States.

Mr. Watson: That is all.

Mr. Gentry: That is all.

The Court: That is all, Mr. Harvey.

(Witness S. C. Harvey excused).

[fol. 661] Mr. Blanton: We rest, Your Honor.

(Plaintiff Rests)

Mr. Gentry: Nothing further.

(Defendants Rest)

(Recital That Record Contains All of the Evidence, etc.)

The Court: You do not care to argue the case now?

Mr. Gentry: I don't see any need to argue it now. We might have the same arrangement about brief that was made in the case the other day, the case that was tried.

The Court: 765?

Mr. Gentry: Yes, sir. Would that be agreeable to you, Mr. Blanton?

Mr. Blanton: I am sorry. I was listening to Mr. Watson. I would like to submit one brief to all three judges jointly.

Mr. Gentry: I think in each case there would have to be a brief devoted to value?

Mr. Blanton: Yes.

The Court: That may be done.

Mr. Gentry: I think the date was about May 4th, and we were to have until May 24th to reply, if that is agreeable to Your Honor.

The Court: I wonder if you are going to have the transcript written up?

Mr. Blanton: I have already ordered the transcript which I will be very glad to furnish.

Mr. Gentry: And in this case also?

Mr. Blanton: Yes.

(Which was all of the evidence offered in the case)

[fol. 662] (Further Proceedings in Case No. 807.)

United States of America, Plaintiff,
No. 807. vs.
Certain Land Situate In The County Of St. Charles, State Of Missouri, Known as Tract No. 24/233, James Karl Muschany, Vera Muschany, et al., Defendants.

Appearances:

Harry C. Blanton, United States Attorney, Russell Vandivort and Drake Watson, Assistant United States Attorneys, for Plaintiff.

William R. Gentry, for Defendants James Karl Muschany and Vera Muschany.

James E. Carroll, Richmond C. Coburn, Robert V. Niedner and R. D. Fitzgibbon, Amici Curiae.

Memorandum of the Court.

(Filed July 6, 1942.)

This is an action by the Government to condemn 33 acres of land for use as a part of the Weldon Springs Ordnance Plant in St. Charles County.

The answer of defendants James K. Muschany and Vera Muschany alleged that the plaintiff entered into an option agreement for the purchase of the land on December 3, 1940, that the plaintiff immediately thereafter entered into possession; and that judgment herein should be for the amount stated in the option contract in lieu of an award by Commissioners.

The reply attacks the validity of the option contract for various reasons hereafter mentioned.

Defendant's motion to strike out the reply was submitted [fol. 663] with the case on the merits.

The sole question is whether the landowners' compensation should be an amount to be determined by Commissioners, or the sale price stated in the option contract.

The issue was tried to the Court.

Findings of Fact.

The President, in a letter to the Secretary of War dated October 17, 1940, approved the construction of the plant at Weldon Springs, Missouri, upon the recommendation of the Council of National Defense, and under the provisions of the Act of September 9, 1940 (Public No. 781, 76th Congress.)

At the time in question, 1940, Col. R. D. Valliant, Quartermaster Corps, was authorized by the Quartermaster General to sign contracts on behalf of the United States pertaining to the purchase of real estate for the War De-

partment, and agreements for personal services in connection with real estate activities for the Department.

Col. Valliant, on October 23, 1940, entered into a contract with R. Newton McDowell whereby said McDowell became the purchasing agent for the War Department to secure options and proposals of property owners within the Weldon Springs area, to sell land and property to the United States for the purpose of the construction of the said plant; said contract provided that McDowell's compensation should be five percent of the gross sales price of any property for which he obtained an acceptable option, which compensation was to be paid to the said McDowell by the party who was selling the property to the United States.

The option contracts were drafted by the War Department and with the approval of the land section. The Quartermaster sought the advice of his legal staff and was [fol. 664] informed that the option contracts were consistent with the Act of July 2, 1940.

On November 29, 1940, McDowell, acting through his agents and employes, obtained an option from defendants J. Karl Muschany and Vera Muschany to sell to the Government a tract of 33 acres of land in St. Charles County, known as Tract No. 24/233, for the sum of Four Thousand Five Hundred Dollars. ($4,500).

This option further provided that the landowners would pay McDowell a commission of 5% of the gross sales price for his services in procuring the sale, preparing the deeds and arranging for settlement and closing the transaction; and that the landowners would also furnish at their cost a certificate of title of the Kansas City Title Insurance Company showing a good title. The option also provided that if the title was not approved by the Attorney-General that a condemnation suit should be instituted and a consent verdict fixing the award at the price stated in the option entered.

This option was accepted by and on behalf of the United States on December 3, 1940, by Col. R. D. Valliant, Quartermaster Corps, United States Army.

Thereafter, on February 20, 1941, defendants J. Karl Muschany and Vera Muschany executed a warranty deed to the said property and delivered it to the Kansas City Title Insurance Company, which for that purpose was the agent of the plaintiff.

The said defendants in December, 1940, surrendered possession of the said land to plaintiff.

The plaintiff on April 9, 1941, filed in this Court this suit to condemn the property in question.

The tract in question is highly fertile Missouri River bottom agricultural land, all cleared except about three acres, with no buildings thereon, subject to occasional overflow.

[fol. 665] The defendants purchased the land in 1939, when it was about to be sold for taxes, for One Thousand Dollars, and made some slight improvements.

There is no evidence that the option price of forty-five hundred dollars included the amount the defendants asked for the land plus McDowell's fee of 5% of sale price, the Kansas City Title Insurance Company's fee of 1½% for examining title, the stamp tax or the recording fee.

Eight witnesses on value for the Government testified that the land was worth from $1,250 to $2,500, their average valuation being $1,972.

Seven witnesses on value for the defendants testified that the land was worth from $3,500 to $5,000, their average valuation being $4,546.

The evidence showed that bottom land similar in character to the tract in question, in the same vicinity, had sold about the time in question at from $135 to $200 per acre. Construction of the Daniel Boone Bridge on Highway 40 in 1937 shortened the distance to St. Louis by about fifteen miles, made a four-lane highway accessible, and substantially increased land values in the Ordnance Plant area. The option price of $4,500 is not an unreasonably excessive valuation of the land in question.

The defense program made the necessity for acquiring the land imminent, and the Quartermaster was directed

in October, 1940, to secure the options within forty-five days.

At the same time, the Quartermaster had the burden of acquiring 108 tracts of land in various parts of the United States involving the expenditure of approximately fifty-eight million dollars. This task exhausted the capacity of the Quartermaster Corps, and the assistance of other agencies of the Government, the Soil Conservation Service, the Forestry Service and the Home Owners Loan [fol. 666] Corporation, was obtained and resort was had to other methods of acquiring land, including that used at Weldon Springs.

The plan of the Government to quickly acquire the land for this project created great concern among the property owners of that area; public meetings were held and letters were sent to landowners. The agricultural and loan agencies, both state and Federal, were likewise interested in the landowners' welfare. The plan carried out by the Government contemplated that the price for which options would be taken should not only include the value of the land, but also the fee of the Government's soliciting agent, the fee of the title examiner, the cost of revenue stamps, the fee for recording the conveyances, and other incidental expenses.

There is no evidence that this plan was followed, or that it in any wise affected the amount of the sale price in the option contract in question.

The Government approved this course of procedure to the end that its over-burdened facilities would be relieved, the land essential to the project would be expeditiously made available, and its soliciting agent would become responsible for the delivery of the property to the Government with a guaranteed title "equivalent to an insurance policy", and the several transactions closed with the issuance of one, instead of several vouchers, for each tract.

Comment.

The Secretary of War was authorized by a statute enacted in 1917 to acquire land for military purposes. 50 U. S. C. A. 171. This could be done by condemnation,

the acceptance of a gift or by private negotiation. The Act said in part:

"That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay."

[fol. 667] This statute vests the Secretary with a discretion which is not subject to review by the Courts. However, the plaintiff contends that the option entered into was contrary to Public Law No. 703, Act of July 2, 1940, which provided in part:

"That the cost-plus-a-percentage system of contracting shall not be used under this section . . . but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

This was a temporary act, expiring by its terms June 30, 1942, and was enacted to build up the national defense, and to that end removed restrictions then imposed by law upon the Secretary of War. The provision against cost-plus-a-percentage contracts is not of the general tenor of the Act (as it enlarged rather than restricted the authority of the Secretary of War), but was an amendment, deliberately inserted, and imposes a restriction that must be observed. It must be noticed, however, that the Act of July 2, 1940, merely provided what the Secretary might do, but it does not provide the manner and means of doing it. It does not mention condemnation, hence it can in no sense be regarded as providing an exclusive method of acquiring land for defense purposes. This suit is not based upon that statute, but upon the older statute. The two acts should be read together, and both given effect, as neither is inconsistent with the other.

The first and probably the principal point urged against the validity of the option is that it violated the prohibition against the "cost-plus-a-percentage" provision of the Act of July 2, 1940. The term "cost-plus" is generally used in connection with construction contracts, and the legal staff of the War Department advised Col. Valliant that the

clause was limited to such agreements and did not apply to contracts for the acquisition of land. The term means that a party who provides facilities, whatever they may be, will be paid his cost therefor, and in addition will be paid a percentage of that cost for his services. Both items are payable to the same party and by the same party. The amount [fol. 668] of each payment is unknown at the time of the execution of the contract. It is the uncertain nature of both items, particularly of the "plus" payment, that gave rise to the opposition to cost-plus-a-percentage contracts.

The option contract in this case required the Government to make not two, but one payment, and the amount of that payment was not unknown, but known, and written into the contract at the time of its execution. If it be assumed that actually the Government was paying the commission, then the amount was not uncertain, but was certain at the time the contract was approved. If the payment to the landowner is to be regarded as the "cost" element and the commission to the agent is to be regarded as the "plus" element, as is argued, then the option agreement is not a cost-plus-a-percentage contract, but is in reality a fixed fee agreement which is expressly authorized by the statute.

The amount that the Government was required to pay was not McDowell's cost in securing the land plus a percentage of that cost for his services, but it was the amount for which the landowner agreed to sell his property and which the purchaser agreed to pay when the option was approved. The option agreement now in question is not a cost-plus-a-percentage contract condemned by the Act of July 2, 1940.

The point is made that the option contract did not contain a clause to the effect that no member of Congress had any interest in the agreement, and that this voids the contract. Reliance is placed upon 41 U. S. C. A. 22. There is no charge or proof that any member of Congress did have any interest in this or any of the option contracts in question. There is evidence that plaintiff usually inserts this provision in its contracts and that the failure to do so in this case was an inadvertence.

[fol. 669] The statute does not provide that invalidity of the agreement shall be the penalty of its violation. The

reasonable interpretation of its purpose is that it is directory only. It is certainly a harsh conclusion to say that the plaintiff may avoid its contracts if its drafting agent has unintentionally left out a clause like that in question. No substantial authority to that effect has been found.

It is also urged that 5 U. S. C. A. 66 makes it a misdemeanor for a Government official or employee to receive any salary in connection with his services as such employee other than from the Government. The statute by its terms is limited to employes drawing a salary from the Government. McDowell was not such an employee. Hence, we apprehend no violation of the statute.

Then it is contended that the option contract is void because it violates the three foregoing statutes. Nothing is added to the force of the argument by saying that three statutes were not observed in drafting the contract. The subject matter of the contract is not illegal, and all that can be said of the agreement is that it is defective in failing to observe requirements as to form. This does not render the agreement unenforcible. Federal Law of Contracts (West Publishing Co.) Vol. 1, p. 339.

It is asserted that the Government is not estopped by the act of its agent, and there is some force in that statement. However, in this case the subject matter of the contract is proper, the desire and need for the acquisition of the property was great, and plaintiff entered, took possession, held and [utulized] the land, all by reason of this contract. The plaintiff, if not estopped, is bound by its agreement, unless other infirmities appear.

[fol. 670] The plaintiff then takes the position that contingency contracts are against public policy. Contingency contracts calculated to corrupt public officials are condemned. The landowner in this case employed no one to secure a contract for him for a percentage of the amount received for the land. He dealt with the party that plaintiff informed him was under contract with the Government to solicit the options. This is not an effort to recover under a contingency fee contract; it is an effort to avoid a contract which plaintiff induced the property owner to enter.

Next it is said that McDowell occupied a dual position. His duty to the Government dictated that he should buy the property for the lowest price and his duty to the landowner was just to the contrary. However, McDowell did not buy the property, did not execute any contracts, but merely obtained an option and passed it on to the Department for its approval or rejection. The contract was executed by Col. Valliant on behalf of the Quartermaster General. It is difficult to see how the plaintiff can avoid its contract because avail was made of means and methods which it devised, and with which the property owner had no concern.

The cases cited do not sustain the position taken by the Government. An agent who buys or sells on commission may be in a dual position. There is no objection to an agent so acting, when both parties to the contract understand the agent's position. While that situation might be considered in an action between the agent and his principal, it is outside the issue in a controversy between the parties to the negotiated contract. The plaintiff cannot complain when it authorized and with full knowledge rati- [fol. 671] fied the agent's acts by accepting the fruits of the contract.

Plaintiff asserts that the Government is not bound by contracts of its agents who exceed their authority. The Secretary of War has broad powers to act, particularly in emergency, and we cannot see that there was an usurpation of authority.

It must be admitted that the Government owes a duty to the public which must pay the bills. This is a general statement of duty and need not be labored here in view of other points made.

Of course, contracts contrary to public policy are not enforceable against the Government. The cases cited show that where the subject matter of the contract or the purpose of the agreement is the doing of an illegal act, the contract is not to be enforced. But very different is an agreement to acquire land for national defense in the face of attack.

The second part of plaintiff's brief presents the question as to whether the option contract in question is constructively fraudulent and hence unenforceable.

Constructive fraud is sought to be imputed to the agreement because (1) the agent's commission was added to the purchase price, (2) the price did not represent the reasonable market value of the land, and (3) McDowell misrepresented the value of the land to Col. Valliant.

It is difficult to consider the value of land except by considering the amount for which it will sell. The circumstances of this case show that other considerations were in the minds of the parties when the option was taken. The necessity of national defense had flashed upon the country. The imminence of the peril was impressive. The land must be acquired at once, without the delay incident to condemnation. Winter was ahead, some crops yet to be gathered, [fol. 672] the landowners were forthwith to be called upon to give up their farms. They hadn't even contemplated such a disturbance of their normal activities, and hadn't anticipated the necessity for finding new farms, homes or places of abode.

The Government was appreciative of the situation and the Quartermaster was instructed to "secure the goodwill of the community" and to "cause the least hardship and inconvenience in moving the tenants off the site." Agricultural and loan agents, both state and Federal, were active in advising and helping the people of the area affected.

This situation in St. Charles County cannot be overlooked in considering the nature of the option contract. If the Government had announced that it would pay only the market value of the property instead of just compensation, and lay all other considerations aside, it would have been unable to buy any of the land. It would have been thwarted in its effort to get immediate possession of the area. The land was sought, but more was demanded; immediate possession was essential to its undertaking.

It was under these circumstances that the Secretary of War was authorized to buy land at a price which in his opinion was reasonable. Even if it be assumed, in the

absence of proof, that the contract in this case included other items than the value of the land, we think it is not constructively fraudulent. There was no obligation on the part of this landowner to limit his offer to the then market value of the land. It was his property and he was not obliged to sell.

It is to be expected that any prudent person contemplating the sale of his land would give consideration to the expense, whatever it may be, incident to the sale. It is unreasonable to say that because the land is going to be taken from him against his will that he must discard the [fol. 673] dictates of prudence and customary dealing, and accept less than at a sale to a private party. When the land owner and the soliciting agent, after negotiation, and there was negotiation, reached a figure deemed proper for submission to the War Department, the Government had various courses open to it. It could have rejected the option, and in some instances it did. It could have withheld its approval and proceeded by condemnation, and in many instances it did. It could have approved and signed the option contract, as it did in this case. The landowner is bound by an option agreement with the Government. Wachovia Bank & Trust Co. vs. United States, 98 F. 2d 609. The rule, in the absence of fraud, works both ways.

Finally, it is contended that the option contract was based upon a mistake of fact and that it was improvident. The proof in this case does not support the charge. The Department devised and put into operation this, as well as other methods of securing information, ascertaining values, and obtaining agreements with landowners for the sale of their property. Col. Valliant personally visited the area, viewed the land, and informed himself of the manner in which contracts of purchase were being solicited. There is an absence of any showing that facts were concealed, that misrepresentations were made, or that duress was used. The price stated in the option contract is not unconscionable. There is no fraud, actual or constructive, in this case. Mere assertion to the contrary does not relieve the plaintiff of the obligation to respect its agreement.

The law deals considerately with acts done and duty performed in emergency. It does not require the exercise of

that degree of discernment that normal conditions impose. The wisdom of policies adopted in an executive department is not a question for the Court. But in view of the imputation of unfaithful conduct on the part of Col. Valliant, in [fol. 674] the instant case, it must be said that that charge is utterly without foundation or substance. His effort to deal fairly and justly with a landowner and the Government tends to call forth approval rather than provoke rebuke.

Justice Murphy, in his concurring opinion in United States vs. Bethlehem Steel Corp., et al., 62 Sup. Ct. 581, decided February 16, 1942, said with reference to an effort of the Government to be relieved of the obligation its contract imposed:

"It is understandable that one may be indignant at Bethlehem's claim, but such indignation does not justify the distortion of established legal principles to relieve the Government of its approval of a hard bargain. It cannot be left out of consideration that the Government entered into the agreements with full understanding of their terms. Surely there is much to be said in favor of the Government's standing behind obligations, even though quite onerous, which it incurred with knowledge of the circumstances."

In a case arising in this District, the facts did not greatly differ from those now before the Court. The Government sought to retract an offer made by letter of $31,681.98 for an easement over a tract of land in Bird's Point-New Madrid Floodway, after it had been accepted in writing by the landowner. The Commissioners in condemnation awarded $17,921.70. The Supreme Court upheld the contract and said, "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought." Danforth vs. United States, 308 U. S. 271. That decision directs the procedure to be followed in the case in hand.

Conclusions of Law.

The Court has jurisdiction of the cause.

Defendant's motion to strike the reply should be overruled.

The plaintiff is entitled to condemn the land in question.

[fol. 675] The plaintiff is entitled to judgment in condemnation.

The option contract is a valid agreement.

The appointment of Commissioners should be dispensed with.

The compensation should be fixed at $4,500, the amount agreed upon in the option contract.

Judgment accordingly may be tendered for approval, signature and entry.

CHARLES B. DAVIS, J.

[fol. 676] Plaintiff's Motion for New Trial.

(Filed July 9, 1942.)

United States of America, Plaintiff,
Docket No. 807. vs. At Law.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

Now comes plaintiff and moves the Court to set aside its verdict, Findings and Judgment and to grant the plaintiff a new trial herein and assign as reasons therefor the following, to-wit:

1. Because the Findings and Judgment of the Court is against the evidence and against the weight of the evidence.

2. That it is against the law under the evidence.

3. The Court admitted over plaintiff's objection and exception, incompetent, irrelevant evidence offered by the defendants.

4. The Court refused to admit competent and relevant evidence offered by the plaintiff.

5. The Findings and Judgment of the Court is against the law and is not supported by the evidence.

6. The Findings of Fact by the Court are not supported or sustained by the evidence.

The Court erred in failing to find under the evidence, that:

(1) The defendants, James Karl Muschany and Vera Muschany, and R. Newton McDowell and others, conspired [fol. 677] to defraud the plaintiff and to fraudulently procure an inflated price from the plaintiff for the land herein condemned.

(2) McDowell was a faithless agent, and that he and the defendants wilfully, falsely and fraudulently represented to the plaintiff that said lands were of a value greatly in excess of the true value thereof.

(3) That the defendants knew that the value of said land, as represented to plaintiff by McDowell, who was for that purpose their agent, was a grossly inflated price far in excess of the true market value thereof and far in excess of the reasonable value of said land, and so knowing seek to profit by said fraud and are prohibited under the law from taking advantage of said McDowell's fraud and are prohibited from recovering under the option agreement.

The Court erred in failing to find that defendants cannot recover because, to do so, they would profit from the illegal and fraudulent action of McDowell.

7. The Court erred in failing to find the agreement relied on by the defendants is unlawful and against public policy because:

(1) Said agreement is contrary to the provisions of the following Congressional Acts:

The Act of July 2, 1940, Public No. 703 (54 Stat. 712);

Public No. 781 (54 Stat. 782);

Section 22 of Title 41, U. S. C.A.;

Section 66 of Title 5, U. S. C. A.;

Section 2 (a) (1) of the Act of June 28, 1940 (54 Stat. 676);

Section 1 (a) of the Act of July 2, 1940 (54 Stat. 712);

Section 2 of the Act of May 2, 1941 (55 Stat. 148);

Section 201 of Title 2 of the Act of December 18, 1941, known as the First War Powers Act of 1941;

[fol. 678] Section 301 of Title 3 of the Act of March [37], 1942, known as the Second War Powers Act of 1942 (Public No. 507);

Section 16 of Title 41, U. S. C. A.;

(2) And is contrary to the following provisions of the Code of Federal Regulations:

Volume 10, Code of Fed. Reg. Title 41, page 7 (1321).

Volume 10, Code of Fed. Reg. Title 41, page 12 (1326).

Volume 10, Code of Fed. Reg. Title 41, page 32 (1346).

Volume 10, Code of Fed. Reg. Title 41, page 34 (1348).

Volume 10, Code of Fed. Reg. Title 41, page 37 (1351).

Volume 10, Code of Fed. Reg. Title 41, page 38 (1352).

Volume 10, Code of Fed. Reg. Title 41, page 49 (1363).

Volume 10, Code of Fed. Reg. Title 41, page 50 (1364).

8. The Court erred in sustaining the validity of said option agreement because it provided for a cost-plus-a-contingent fee of 5% and such an agreement is illegal, because:

(1) It tends toward working a fraud on the plaintiff government.

(2) It did work a fraud on the plaintiff, and

(3) The defendants, by the Court's Findings and Judgment, reap a benefit from said illegal agreement and are parties to it, and

(4) It is contrary to 10 Code Fed. Reg. Title 41, page 15 (1329); 10 Code Fed. Reg. Title 41, page 34 (1348).

9. The Court erred in holding that the plaintiff government is bound by the Acts of its officers when they exceed their authority in negotiating or accepting said option agreement, regardless of whether such unauthorized acts are the result of accident, mistake, fraud or otherwise.

[fol. 679] 10. The Court erred because the inclusion of commissions to McDowell and the Title Company in the

option price is a fraud on plaintiff government, even though known to Valliant, and the government is not estopped.

11. The Court erred in not holding said option agreement to be fraudulent and void as to plaintiff government, because it included, unknown to Valliant or plaintiff, compensation for other things than the land, such as lost profits, allowances to tenants, payment for personal property, allowance for documentary stamps, recorder's fees and commissions on commissions.

12. The Court erred in failing to find that the option agreement is so improvident that it ought not to be enforced against the government.

13. The option agreement was never executed because there was no meeting of the minds by the land owners, defendants, and the plaintiff government.

14. The Court erred in holding that the consideration recited in the option was the reasonable market value of the land, or if it did not so hold, then in holding the plaintiff is authorized or required to pay more than the reasonable market value of the land.

15. The Court erred in holding the option agreement was ever executed by plaintiff, because the evidence shows that the only officer purporting to act on behalf of the plaintiff government in executing the same, did not exercise any discretion or judgment as to whether the option price as recommended by McDowell was the fair, reasonable price of the land; made no investigation; had no knowledge of the land value, except the recommendation of McDowell, and only examined the form of the option, and if in due form, he signed it. Said so signing was purely an arbitrary [fol. 680] act and was not an act of the executive branch of the government, but was no act at all, and the Court erred in failing to find that said so signing was an arbitrary act.

16. The Court erred in holding that the plaintiff government was estopped and was not acting in its sovereign capacity.

17. The Court erred in holding that the option agreement is valid and that the compensation should be fixed, or was by the Court fixed, at $4500.00.

18. The Court erred in overlooking and failing to follow the express requirement of the Statutes of Missouri; (R. S. 1939, Sec. 1506); and Section 21 of Article 2 of the Missouri Constitution) which is mandatory and provides the only method that can be legally followed and requires that the compensation in condemnation shall be determined by Commissioners.

19. The Court erred in failing to find that Valliant, who purported to act on behalf of plaintiff, did not have authority to accept on behalf of plaintiff said option.

20. The Court erred in finding that the Kansas City Title Company was the Agent of plaintiff and in finding said Company to be the Agent of plaintiff in accepting any deed to the property herein condemned.

21. The Court erred in finding that the option price of $4500.00 did not include the amount the defendants asked for said land, plus McDowell's fee of 5% and the Kansas City Title Company's fee of 1½%, and the stamp tax and the recording fee, and in finding that the option price was not excessive, inflated and far higher than the fair value of the land, and in finding that it was not unreasonably excessive, and in finding that the plaintiff government contemplated, carried out or approved a plan that the price [fol. 681] for which options would be taken should not only include the value of the land, but also the fee of McDowell and of the examiner and the cost of revenue stamps and the fee for recording conveyances and other expenses, and erred in finding that the plaintiff government, under the law, could do so.

22. The Court erred in construing the Act of July 2, 1940 to not control the method of fixing the compensation herein.

23. The Court erred in failing to find that the option agreement was void on its face because it provided that McDowell was to be paid a commission of 5% of the option price and therefore it was contrary to the prohibition against "cost-plus-a-percentage-of-cost system of contracting" contained in Public Law No. 703 (54 Stat. 712).

24. The Court erred in failing to find that the defendants and McDowell conspired to cause, and did cause to be

included in the option price of the land not only the reasonable value of said land as represented by the defendants, but in addition thereto the 5% commission to be received by McDowell so that said option agreement as it was treated and acted upon by said defendants and said McDowell was void because it was contrary to the prohibition against the "cost-plus-a-percentage-of-cost system of contracting" contained in Public Law No. 703 (54 Stat. 712).

25. The Court erred in failing to find that the defendants and McDowell conspired to cause, and did cause to be included in the option price of the land not only the reasonable value of said land as represented by the defendants, but in addition thereto the 5% commission to be received by McDowell so that the transaction was entirely null and void because it was in violation of the express terms of the option agreement which provided that the 5% commis- [fol. 682] sion to said McDowell was to be paid by said defendants.

26. The Court erred in holding that the plaintiff "with full knowledge ratified the agent's acts by accepting the fruits of the contract" (the Government cannot ratify an illegal agreement), and erred in holding that the plaintiff acquired under said option any right that plaintiff did not theretofore have to take said lands.

27. The Court erred in holding that because the option was for acquiring land for national defense it was, therefore, legal, and erred in holding that for it to be illegal the subject matter or purpose of the agreement must be illegal and in excluding from the class of illegal agreements those where, as in this case, the methods employed in procuring it are illegal.

(S) HARRY C. BLANTON,
United States Attorney,

(S) RUSSELL VANDIVORT,
Assistant United States Attorney,

(S) DRAKE WATSON,
Special Assistant United States Attorney.

[fol. 683] (Order overruling Motion of Plaintiff for New Trial.)

No. 807.

Memorandum for Clerk

(Filed September 21, 1942)

Plaintiff's motion for a new trial over-ruled.

(s) CHARLES B. DAVIS,
United States District Judge

[fol. 684] (Decree.)

In the District Court of the United States For the Eastern Division of the Eastern Judicial District of Missouri

United States of America, Plaintiff,
No. 807 vs.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, James Karl Muschany, Vera Muschany, et al., Defendants.

(Filed October 12, 1942)

This cause having been previously tried, the evidence for both plaintiff and defendants having been offered and the cause having been taken under advisement by the Court, and the Court having considered the evidence and the briefs of counsel filed in this cause and being now fully advised in the premises, it is ordered, adjudged and decreed by the Court that defendants' motion to strike out parts of plaintiff's reply be, and the same is, hereby overruled.

It is further ordered, adjudged and decreed that all of the following described land:

Certain land situated in the County of St. Charles, Missouri, known as Tract No. 24/233, and more particularly described as:

A tract of land situate in U. S. Survey No. 1670, Township 45 North, Ranges 2 and 3 East and being a part of Lots No. Five and Six as designated in the report of the Commissioners appointed to make partition among the

heirs of William Hayes, deceased, and more particularly described as follows; to-wit:

Commencing at the Northeast corner of said Lot No. Five, thence along the easterly line of said Lots No. 5 and 6, South 22 degrees 0 minutes West 28.40 chains, more or less, to the most Southern corner of said Lot No. 6, thence North 68 degrees West along the southerly line of said Lot No. 6, 13.14 chains to a point, thence North 22 degrees 0 minutes East 28.40 chains more or less, to the northerly line of said lot No. five, thence south 68 degrees East along the northerly line of said Lot No. five, 13.14 chains to the place of beginning, containing 33.33 acres, more or less.

Also a strip of ground 16 feet wide, for use as a roadway to and from said tract of land hereinabove described off of the southerly side of said lot No. 6, extending from the westerly line of the tract of land hereinabove described, along the southerly line of the said Lot No. 6 North 68 degrees West, approximately 16.50 chains to the center line (or a northerly extension thereof) of a certain public road running in a northeasterly and southwesterly direction and striking the South line of said Lot No. 6 about 10 chains South 68 degrees East from the Southwestern corner of the said Lot No. 6, the said northerly line of said strip of ground 16 feet wide running parallel with said south line of the said Lot No. 6, a distance of 16 feet therefrom.

[fol. 685] be condemned for the use and benefit of the plaintiff herein and that the fee simple title to all of said land is hereby adjudged to be vested absolutely in the plaintiff, subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

It is further adjudged and decreed that the option contract pleaded in the answer of the defendants is a lawful, valid and binding agreement and that the above mentioned condemnation is made pursuant to the terms of said option contract and that, therefore, the appointment of commissioners should be dispensed with, and it is so ordered.

It is further adjudged and decreed that pursuant to the terms of said option contract defendants are entitled to the sum of Four Thousand Five Hundred Dollars which is the amount agreed upon in said option contract; and it appearing to the Court from the evidence herein that on the 19th day of April, 1941, at the time of the institution of this suit the plaintiff filed a notice of taking and paid into the registry of this Court the sum of Nine Hundred Fifty Dollars as the estimated value of the land herein described, the plaintiff is now ordered to pay into the registry of this Court the sum of One Hundred Two and no/100ths Dollars, which is the amount of interest at six percent on said sum of Forty-Five Hundred Dollars from the 3rd day of December, 1940, which the evidence shows to be the date on which defendants surrendered possession of said land to plaintiff) to said 19th day of April, 1941, and the sum of Thirty-five Hundred Fifty Dollars which is the difference between the sum heretofore deposited as aforesaid by the plaintiff and the amount herein awarded to the plaintiff pursuant to said option contract, together with interest on said sum of Thirty-five Hundred Fifty Dollars, from the 19th day of April, 1941 to the date of the payment of said amount.

CHARLES B. DAVIS,
Judge.

[fol. 686] Motion of Plaintiff for the Transmission of the Original Exhibits to the Appellate Court.

(Filed December 19, 1942)

United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

Tract No. 24/233

Comes now the appellant, United States of America, by Harry C. Blanton, United States Attorney, Russell Vandivort, Assistant United States Attorney, and Drake Watson, Special Assistant United States Attorney, and moves the Court for an order directing the Clerk of this Court

to transmit all the original exhibits in the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, together with the transcript on appeal herein; that some of the exhibits consist of large plats which would be most difficult and expensive to reproduce, as well as of many reports, documents, letters, and other data which would be inordinately expensive to reproduce.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

DRAKE WATSON,
Special Assistant
United States Attorney.

[fol. 687] Order for Transmission of Original Exhibits to the Appellate Court

(Filed December 19, 1942)

The motion of the appellant for an Order directing the Clerk of this Court to transmit to the Circuit Court of Appeals for the Eighth Circuit the original exhibits in the above entitled cause, coming on to be heard, and the Court being fully advised in the premises;

It is hereby Ordered that the Clerk of this Court be, and he is hereby authorized and directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, together with the transcript of record on appeal herein, all of the original exhibits introduced at the trial of this cause, with instructions to said Clerk of the said Circuit Court of Appeals to return said exhibits to this Court upon the rendition of the final decision in said Circuit Court of Appeals.

CHAS. B. DAVIS,
United States District Judge.

[fol. 688] **Statement of Points to be Relied Upon by the Appellant**

(Filed December 19, 1942)

United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

Tract No. 24/233

The appellant, United States of America, pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, makes the following statement of points upon which it intends to rely upon appeal.

1. That the Court erred in each of its Findings of Fact and Conclusions of Law.

2. That the Court erred in overruling plaintiff's motion for a new trial.

3. That the Court erred in sustaining the validity of the alleged option contract, and in ordering judgment in favor of the defendant-property owners, in accordance with the terms of said alleged option contract.

4. That the Court erred in allowing the defendant-owner interest in addition to the amount set up in the option contract.

5. That the Court erred in refusing to set aside the alleged option contract and in enforcing said contract, [fol. 689] rather than appoint commissioners to assess damages.

6. That the Court erred in rejecting certain competent, material, and relevant evidence offered by the plaintiff.

7. That the Court erred in admitting incompetent, immaterial and irrelevant evidence offered by the defendant-owners.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

DRAKE WATSON,
Special Assistant
United States Attorney.

Copy of the above Appellant's Statement of points mailed to counsel of record for defendant-property-owner this 19th day of December 1942.

HARRY C. BLANTON,
United States Attorney.

[fol. 690] Order Extending Time for Filing Transcript and Docketing Case

(Filed December 22, 1942)

United States of America, Plaintiff,
Docket No. 807 vs. At Law
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

Tract No. 24/233

It appearing to the Court that a Notice of Appeal was filed herein on the 18th day of December, 1942 by the plaintiff, United States of America, of its intention to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from a final judgment entered herein on the 12th day of October, 1942 in this action, said judgment ascertaining, determining, adjudging, and fixing the sum of Forty Five Hundred Dollars ($4,500.00) plus certain interest as full and complete just compensation which plaintiff is required to pay for the taking of the land designated in this cause as Tract No. 24/233 in the County of St. Charles, in the State of Missouri; and adjudging

the option pleaded in this case as a valid binding obligation upon the plaintiff herein.

And it appearing to the Court that the time for the filing of the record on appeal and docketing the action on appeal will expire on or about January 27, 1943;

And it further appearing to the Court that the reporter's transcript of the evidence taken at said trial is volum-[fol. 690A] inous, and that it will require more than the said forty (40) days to perfect said appeal;

It Is, Therefore, Ordered by the Court that the time for filing the record on appeal and docketing the action on the appeal in this cause be, and the same is hereby, extended to and including the 18th day of March, 1943, said time being not more than ninety (90) days from the date of the said notice of appeal, and said notice of appeal being the first notice of appeal in said cause.

CHAS. B. DAVIS,
Judge, United States District Court
For the Eastern District of Missouri
Eastern Division

[fol. 691] (Docket Entries in District Court.)

United States of America, Plaintiff,
Case No. 807. vs.
Certain land situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233 and James Karl Muschany, et al., Defendants.

4-9-41 Motion of plaintiff for leave to file petition in condemnation and for order for summons filed and presented and granted in order filed and entered; petition in condemnation filed and summons issued directed to defendants, returnable May 26, 1941; on oral motion of plaintiff, order and judgment filed and entered on declaration of taking filed April 7, 1941, in Cause No. 771, vesting fee simple title in plaintiff as to tract designated herein and directing delivery of immediate possession to plaintiff; order filed and entered directing notice be given to defend-

ants of judgment on declaration of taking and of requirement for immediate delivery of possession to plaintiff; on oral motion of U. S. Attorney, order filed and entered directing the transfer of $950.00 to this cause for the use and benefit of defendants entitled thereto from the sum heretofore deposited by plaintiff in registry under declaration of taking filed in said Cause No. 771, being the estimated compensation for said Tract No. 24/233 herein

5-17-41 Joint answer of defendants James Karl Muschany and Vera Muschany, his wife, to plaintiff's petition in condemnation, filed

5-26-41 Marshal's return of service to summons and order filed (executed)

5-26-41 Order filed and entered continuing cause to June 16, 1941

5-27-41 On oral application, plaintiff granted 30 days from date in which to plead to answer filed herein by defendants James Karl Muschany and Vera Muschany, in order filed and entered

6-16-41 On motion of U. S. Attorney, order filed and entered continuing cause to June 30, 1941

[fol. 692]

6-24-41 On motion of plaintiff filed and presented order filed and entered granting plaintiff leave to amend petition by adding Hugo Rottman, executor, etc., et al., as additional parties defendant and directing issuance of summons and notice to such defendants returnable August 18, 1941

6-30-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to August 18, 1941

8-18-41 Order of Hon. J. Collet continuing cause to Sept. 15, 1941 filed and entered

8-20-41	Return of Marshal as to service of summons of June 24th, 1941, filed (executed)
9-15-41	On motion of U. S. Attorney, order filed and entered continuing case to October 14, 1941, Division No. 1
10-10-41	On oral motion of U. S. Attorney cause set for Dec. 10, 1941
10-14-41	On oral motion of U. S. Attorney order filed and entered continuing cause to Dec. 10, 1941
11-25-41	Reply of plaintiff to separate answer of defendant James Karl Muschany filed by leave
11-28-41	Notice of presentation on November 29, 1941 of application of U. S. of A. for a commission to take depositions filed by plaintiff
11-29-41	Application of plaintiff for commission to take deposition on interrogatories and application to shorten time for taking same, filed, heard, argued, submitted and denied
11-29-41	Marshal's return of service to notice of application for commission to take deposition etc., filed (executed)
12-1-41	Praecipe for subpoena filed and issued to Walter Cunningham
12-2-41	On motion of plaintiff filed and presented order filed and entered granting plaintiff leave to file attached exhibit "A" as an exhibit to plaintiff's reply herein, etc.
12-8-41	Motion of defendant James Karl Muschany to strike out portions of plaintiff's reply to said defendant's answer filed by leave
12-10-41	On oral motion of U. S. Attorney order filed and entered continuing cause to December 15, 1941
12-10-41	Motion of defendant James Karl Muschany for continuance of cause set for trial on December 15, 1941, filed by leave

[fol. 693]

12-15-41 On motion of U. S. Attorney order of Hon. Charles B. Davis filed and entered continuing cause to March 16, 1942

12-16-41 Marshal's return of service to subpoena filed (executed)

2-9-42 On oral motion of U. S. Attorney case set for trial on March 16, 1942

3-4-42 Praecipe for subpoena filed and issued to Welsh and Schreiner

3-5-42 Marshal's return of service to subpoena filed (executed)

3-11-42 Return of Marshal of Western District of Mo., of service to subpoena filed (executed)

3-16-42 On oral motion of U. S. Attorney order filed and entered continuing cause to March 30, 1942

3-21-42 On oral motion of U. S. Attorney, order filed and entered granting plaintiff leave to file attached amendment to plaintiff's reply herein

3-31-42 By leave, plaintiff's first amended reply to answer of defendants James Karl and Vera Muschany, filed

3-31-42 Praecipe for subpoena filed and issued to C. H. Ewald

4-2-42 Marshal's return of service to subpoena duces tecum filed (executed)

4-2-42 Cause continued to April 6, 1942

4-2-42 Marshal's return of service to subpoena filed (executed)

4-3-42 By leave, plaintiff's second amended reply to the separate answer of defendants James K. and Vera Muschany to plaintiff's petition filed

4-3-42 Praecipe for subpoena filed and issued to R. A. Langenbacher and Richard Anslem

4-6-42 Trial of cause before the Court on issues raised by Plaintiff's petition in condemnation, the answer of defendants James Karl Muschany and Vera Muschany, his wife, thereto and the reply of plaintiff to said answer, commenced, but not being concluded at the hour of adjournment, further proceedings postponed until tomorrow at ten o'clock A. M.

[fol. 694]

4-7-42 Trial of cause before the Court on issues raised by plaintiff's petition in condemnation, the answer of James Karl Muschany and Vera Muschany thereto, and the reply of plaintiff to said answer, is resumed, concluded and such issues submitted on briefs to be hereafter presented; plaintiff granted until May 4, 1942 within which to submit brief, defendants until May 15, 1942 within which to submit answering brief, and plaintiff until May 20, 1942 within which to submit reply brief

4-15-42 Marshal's return (2) of service to subpoena filed (executed)

4-29-42 Upon oral application, Messrs. James E. Carroll, Richmond C. Coburn, Richard D. Fitzgibbon and Robert Niedner granted leave to file in amicus curiae brief in this cause

6-11-42 Upon oral motion of U. S. Attorney order filed and entered jointly in Cases 765, 874 and 807, granting plaintiff to and including June 27, 1942 within which to file reply brief in said causes

7-6-42 Memorandum opinion of the Court, embodying findings of fact and conclusions of law, on the issues raised by the pleadings of the parties filed finding plaintiff entitled to condemn the land in question and to judgment in condemnation, as well as finding option contract a valid agreement and the appointment of commissioners should be dispensed with, and that the compensation should be fixed at $4500., the

amount agreed upon in the option contract; judgment accordingly to be tendered for approval, signature and entry

7-6-42 Cards mailed to William R. Gentry, Esq., and Harry C. Blanton, Esq., notifying of memorandum opinion of the Court for judgment as to option contract

7-9-42 Motion of plaintiff for a new trial filed

9-10-42 Notice of attorney for plaintiff to docket motion of plaintiff for new trial, filed

9-14-42 Motion of plaintiff for a new trial heard and submitted

9-21-42 Motion of plaintiff for a new trial, overruled

9-21-42 Cards mailed to U. S. Attorney and Wm. R. Gentry, Attorney for defendants Muschany, notifying of the overruling of Plaintiff's motion of a new trial

[fol. 695]

10-12-42 Decree filed and entered overruling motion of defendants to strike out parts of plaintiff's reply; adjudging fee simple title to land described therein be vested absolutely in plaintiff, subject to existing easements, etc.; decreeing that option contract pleaded in defendants' answer is a valid and binding agreement, dispensing with appointment of commissioners etc. and adjudging defendants pursuant to the terms of said option contract, to be entitled to the sum of $4500.00, the amount agreed upon in said option contract, and directing plaintiff to pay into Registry the deficiency of $3550.00, together with certain interest etc.

12-18-42 Notice of appeal to the U. S. C. C. A., 8th Circuit of the United States of America, Plaintiff herein, from the final judgment entered in this cause Oct. 12, 1942 and from the order entered Sept. 21, 1942 overruling Plaintiff's motion for a new trial, filed.

12-19-42 Motion of plaintiff for the transmission of the original exhibits to the Appellate Court on its appeal herein filed, presented and granted in order filed and entered

12-19-42 Plaintiff's statement of points upon which it will rely upon its appeal herein filed

12-19-42 Stipulation of parties for joint transcript of the record on the appeals of plaintiff filed. Plaintiff's designation of the contents of the record and proceedings to be included in joint transcript on appeal filed

12-21-42 Certificate of Clerk as to mailing of notice to parties in interest of appeal of plaintiff from final judgment entered October 12, 1942, filed

12-22-42 Order filed and entered extending time of plaintiff to and including March 18, 1943 in which to file and docket transcript of record on appeal in the U. S. C. C. A., 8th Circuit

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[fol. 696] (Proceedings Relating to Tract No. 19 in Case No. 874.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

Petition in Condemnation.

Tract No. 19.

United States of America, Plaintiff,
Docket No. 874. vs. At Law.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and

William M. Andrews

Bertha L. Andrews

Collector of Revenue of St. Charles County, Missouri

St. Charles County, Missouri

L. R. Freeman, doing business as Freeman Bros. Stove Company

Joe Schulte

Fred Schulte Defendants.

[fol. 697] Petition in Condemnation.

(Filed April 15, 1941)

To The Honorable, The Judges Of The United States District Court For The Eastern District of Missouri:

Now Comes the plaintiff herein, the United States of America, a sovereign, by its attorneys, Harry C. Blanton, United States Attorney for the Eastern Judicial District of Missouri, and A. G. Edwards, Special Assistant to the United States Attorney, and, leave of Court having been first obtained, files this, its petition herein, at the direction and under the authority of the Attorney General of the United States pursuant to the request of the Secretary of War of the United States, and represents unto the Court as follows:

First: That the defendants herein named are the owners of or claim or may claim an interest or interests in and to the real estate in this petition described, which the plaintiff seeks to condemn in and by this proceeding for the public uses hereinafter more particularly set out;

Second: That the said real estate hereinafter described is located in St. Charles County, Missouri, and within the jurisdiction of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri;

Third: That the plaintiff, the United States of America, is authorized [ane] empowered to acquire the lands herein described by purchase, condemnation, or otherwise, and that the United States Attorney is acting under instructions from the Attorney General of the United States and at the request of the Secretary of War of the United States;

Fourth: That this is an action having for its purpose, among other things, the acquiring by condemnation and in

fee simple absolute of the land hereinafter described and the title thereto, which real estate is located as aforesaid, and is authorized and directed to be brought by the Secre- [fol. 698] tary of War pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 USC Section 257); and the Act of Congress approved July 2, 1917, USC 50:171, as amended, which authorizes the acquisition by the Secretary of War of land suitable and necessary for military purposes, and the Act of Congress approved June 26, 1940 (Public No. 667—76th Congress); and the Act of Congress approved September 24, 1940 (Publ. Res. 99—76th Congress); which Acts appropriated funds for such purposes;

Fifth: That the project herein referred to and the matters to be performed, being an acquisition of land for military purposes for an ordnance plant and the national defense of the United States, are within the purview of the sovereign plaintiff and of the Congress of the United States and the said lands and territory to be acquired are located within the jurisdiction of this Court;

Sixth: That it is the opinion of the Secretary of War that it is necessary and advantageous to the interests of this sovereign plaintiff that the said land be acquired by condemnation under judicial process, and that the acquisition in fee simple of said lands be had forthwith; that the money has been appropriated and is available to pay for said lands;

Seventh: That the land to be condemned and the nature and extent of the interests therein of the various persons and claimants thereto as to each respective parcel is described as follows:

[fol. 699] Amended description

Case No. 874

Tract No. 19.

Tract No. 19 containing 94.46 acres, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

Lot No. Four (4) being part of U. S. Survey No. 887 and part of the northwest quarter of Section 26 of Town-

ship 46 North, Range 2 East, described and bounded as follows: Beginning at the Northwest corner of said lot, this being also the Northwestern corner of U. S. Survey No. 887, thence along the Northern line of said U. S. Survey, which is also along a county road, North 80 degrees East 21.78 chains to corner from which a White Oak 30 inches in diameter bears South 60° East 39 links and a White Oak 30 inches in diameter bears South 47½° West 57 links, thence South 10° East along a county road 29.75 chains to corner from which a White Oak 8 inches in diameter bears North 67½ East 49 links and a Black Oak 10 inches in diameter bears North 62½° West 20 links, thence South 83° West 13.64 chains to corner from which a Hickory 6 inches in diameter bears South 23° West 17 links and a Hickory 4 inches in diameter bears North 9° East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼° West 19 links and a Hickory 12 inches in diameter bears South 62° West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner in county road on Morris' line, alias the North line of said Section 26, from which corner a Post Oak 10 inches in diameter bears South 14½° West 54 links, and a Black Oak 5 inches in diameter bears South 39½° East 43 links, thence East 4.14 chains along said county road to Morris' Southeast corner, from which a Hickory 10 inches in diameter bears North 43° West 50 links, thence North 10° West along said county road 25 chains to place of beginning, containing 94.46 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 700] That the following defendants own or may own or may claim to have some right, title, interest, lien or estate in, to or upon said land:

William M. Andrews.
Bertha L. Andrews
L. R. Freeman, doing business as Freeman Bros. Stove Company
Joe Schulte
Fred Schulte

[fol. 701] Eighth: That all of the land described in this petition is subject to liens or claims for certain taxes, and the County of St. Charles, State of Missouri, and the Collector of Revenue of St. Charles County, Missouri, are, therefore, named parties defendant herein;

Ninth: That within the boundaries of the above described tract of land are located certain roads and highways; that the defendants hereinbefore named as owners of the fee and as claiming an interest in said lands, each claim and assert, or may claim and assert a reversionary interest in and to the premises respectively so occupied as roads and highways, and which reversionary interests the plaintiff herein seeks to include and condemn in this proceeding;

Tenth: That all and singular, the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors and assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants, having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees, users, holders and owners of and claimants to easements in, on, over, across or through said lands; and all persons, firms and corporations having or claiming any title to or interest in any of said land or any part thereof, herein sought to be condemned, are made parties defendants, as hereinabove specifically named, if known, and if unknown, such unknown persons by the description of the "Unknown Owners" of the land herein described and to be condemned, to the end that they may come into Court and by proper pleadings make known their interests and claims to said lands or to the proceeds arising therefrom;

Eleventh: That your petitioner has attempted to set forth the interest or estates of all persons, firms, and corporations in the lands herein mentioned as far as your petitioner has been able to ascertain the same; but, notwithstanding such statement, all persons, firms or corporations, including all unknown officers, trustees, directors and shareholders of any defunct corporation having or claiming any interest or estate in or to said land, are made parties to this proceeding generally, to the end that

all of their rights, title, interests and estate, whatever it [fol. 702] may be, to all and singular, the premises above mentioned may be reached and divested out of them and vested in your petitioner, the United States of America;

Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and will make and have entered all such orders, judgments and decrees as may be necessary to bring all the known owners of said land before this Court, and to make all unknown parties having any interest therein defendants hereto, and to that end that process, summons and notice may issue for the defendants hereinbefore named, and for the order of the Court directing notice of suit, and for publication thereof to the unknown, not found and non-resident defendants herein, if any there be, all as required by law, giving them notice of the time when and the place where this petition will be heard, and for such other orders and decrees as may be proper and necessary; and that the Court will appoint three disinterested commissioners, qualified by law, to determine, assess, and award the value of the property proposed to be taken and other damages which may be sustained by the respective owners of or persons claiming an interest in and to the aforesaid property hereinbefore described and proposed to be taken; and that said commissioners will assess according to the provisions of the acts appropos to this proceeding and the provisions of the law applicable thereto, under which this action is brought, the special and direct benefits arising from the improvements, if any, which may be sustained by, or may accrue to, said defendants; that the Court will decree to this plaintiff the right of judgment in condemnation herein in fee simple as contemplated by the laws of Congress in this case made applicable, and that these defendants and each of them, and all other claimants, be required to show cause on the day therein fixed why said plaintiff should not have the relief herein prayed for; that plaintiff may have judgment for condemnation of the property hereinbefore described, and that the defendants, and each of them shall be divested of all of their said right, title and interest in and to the aforesaid premises, and that the title thereto in fee simple shall be vested in this sovereign plaintiff, and that it shall have, own and control the same forever; that the Court,

upon the filing of this petition, will make an order pur-
[fol. 703] suant to the Act of Congress approved February 26, 1931 (46 Stat. 1421), decreeing to the plaintiff the right to take immediate possession of said lands for the purposes hereinbefore described in order that the plaintiff, its servants, agents and employees may proceed with the aforesaid project and for the purposes hereinbefore required and to permit the said plaintiff to proceed with the work of construction of said ordnance plant as contemplated by the plans of said project; that the plaintiff may have judgment against the respective premises, property or interests therein for special benefits, if any, in excess of the values and damages in each instance assessed in the premises by the aforesaid commissioners; and that this Court will make such further necessary orders in the premises as shall be just, proper, necessary and requisite to vest said lands in fee simple absolute in the United States of America, and grant to this petitioner all such other and further relief in the premises to which this petitioner may be found entitled and as the Court may deem just and proper.

THE UNITED STATES OF AMERICA
By Herbert H. Freer,
Asst. United States Attorney for the
Eastern District of Missouri,
402 New Federal Building,
St. Louis, Missouri.

A. G. EDWARDS,
Special Assistant to the
United States Attorney
410 New Federal Building, St. Louis, Missouri.

[fol. 704] United States of America,
Eastern District of Missouri.—ss.:

Before me, the undersigned, personally appeared Herbert H. Freer, United States Attorney in and for the Eastern District of Missouri, and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and

belief; and that this proceeding is in good faith for the purposes specified in the petition.

(s) HERBERT H. FREER

Subscribed and sworn to before me this 15th day of April, 1941.

JAMES J. O'CONNOR,
Clerk of the U. S. District Court
in and for the Eastern District
of Missouri.
By (s) C. E. Rudolph,
Deputy Clerk.

(Seal)

Endorsed: Filed: April 15, 1941. Jas. J. O'Connor, Clerk.

[fol. 705] Declaration of Taking.

To the Honorable, The United States District Court:

(Filed April 15, 1941.)

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518; 50 U. S. C. Sec. 171), and the Act of Congress approved June 26, 1940 (public No. 667—76th Congress 3d Sess.).

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the establishment of an ordnance plant for the production of materials for National Defense. The said lands have been selected by me for acquisition by the [fol. 706] United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to all existing rights for easements for public roads, pipe lines and public utilities, in, across and over the lands acquired.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this 10th day of April, A. D. 1941, in the City of Washington, District of Columbia.

HENRY L. STIMSON,
Secretary of War of the
United States.

[fol. 707] Schedule "A".

The land which is the subject matter of this Declaration of Taking and of this condemnation is situate in the County of St. Charles, State of Missouri. A description of the lands taken, together with a list of the purported owners thereof, and a statement of the sum estimated to be just compensation therefor is as follows:

Tract No. 19.

Description:

Lot No. Four (4) being part of U. S. Survey No. 887 and part of the Northwest quarter of Section 26 of Township 46 North, Range 2 East, described and bounded as follows: Beginning at the Northwest corner of said lot, this being also the Northwestern corner of U. S. Survey No. 887, thence along the northern line of said U. S. Survey, which is also along a county road, North 80 degrees East 21.78 chains to corner from which a White Oak 30 inches in diameter bears South 60° East 39 links and a White Oak 30 inches in diameter bears South 47½° West 57 links, thence South 10° East 29.75 chains to corner from which a White Oak 8 inches in diameter bears North 67½ East 49 links and a Black Oak 10 inches in diameter bears North 62½° West 20 links, thence South 83° West 13.64 chains to corner from which a Hickory 6 inches in diameter bears South 23° West 17 links and a Hickory 4 inches in diameter bears North 9° East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼° West 19 links and a Hickory 12 inches in diameter bears South 62° West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner on Morris line from which corner a post oak 10 inches in diameter bears South 14½° West 54 links, and a Black Oak 5 inches in diameter bears South 39½° East 43 links, thence East 4.14 chains to Morris Southeast corner from which a Hickory 10 inches in diameter bears North 43° West 50 links, thence North 10° West 25 chains to place of beginning, containing 94.46 acres, more or less.

Names of Purported Owners: William M. Andrews and Bertha L. Andrews. Estimated Compensation: $3,460.00.

The gross sum estimated to be just compensation for the land hereby taken is $60,997.00.

[fol. 708] In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19 and William M. Andrews, et al., Defendants.

Order and Judgment on Declaration of Taking.

(Filed April 15, 1941.)

This cause coming on to be heard at this term of Court upon the motion of the plaintiff, the United States of America, to enter a judgment herein on the Declaration of Taking filed in Case No. 854 on April 14, 1941, and upon consideration of said motion, and the condemnation petition filed herein, and the Declaration of Taking filed in said Cause No. 854, the Court, having heard arguments of counsel and being fully advised in the premises, finds:

First: That a petition in condemnation was duly filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the land described in said petition, and also under authority of the Attorney General of the United States:

Second: That said Petition filed herein and the Declaration of Taking heretofore filed in Cause No. 854 state the authority under which, and the public use for which, said land was taken; that said Declaration of Taking was signed by the Secretary of War of the United States, who was, and is, duly authorized and empowered by law to acquire the land described in said petition for, on behalf of and in the name of the United States of America, for the purposes therein set forth;

[fol. 709] Third: That a proper description of the land taken, sufficient for identification thereof, is set out in the said Declaration of Taking;

Fourth: That the said Declaration of Taking contains a statement of the estate or interest in the said land taken for said public use:

Fifth: That a map or plan showing the land taken is annexed to and made a part of the said Declaration of Taking;

Sixth: That a statement is contained in the said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for Tract No. 19, in the amount of Three Thousand Four Hundred Sixty Dollars, No Cents ($3,460.00), and that said sum was depostied in the Registry of this Court in Case No. 854 to the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking:

Seventh: That a statement is contained in the said Declaration of Taking that the amount of the ultimate award of compensation for Tract No. 19, for the taking of said property, in the opinion of the Secretary of War of the United States, probably will be within any limits prescribed by Congress on the prices to be paid therefor,

It Is Therefore Ordered And Adjudged that the title to said land in fee simple absolute, vested in the United States of America upon the filing of the said Declaration of Taking and depositing in the Registry of this Court of the aforesaid estimated compensation, which land is situated in St. Charles County, Missouri, and described as follows:

[fol. 710] Tract No. 19.

Tract No. 19 containing 94.46 acres, more or less, situated in St. Charles County, Missouri, and more particularly described as follows:

Lot No. Four (4) being part of U. S. Survey No. 887 and part of the Northwest quarter of Section 26 of Township 46 North, Range 2 East, described and bounded as follows: Beginning at the Northwest corner of said lot, this being also the Northwestern corner of U. S. Survey No. 887, thence along the northern line of said U. S. Survey, which is also along a county road, North 80 degrees East 21.78 chains to corner from which a White Oak 30 inches in diameter bears South 60° East 39 links and a White Oak 30 inches in diameter bears South 47½° West 57 links, thence South 10° East 29.75 chains to corner from which a

White Oak 8 inches in diameter bears North 67½ East 49 links and a Black Oak 10 inches in diameter bears North 62½° West 20 links, thence South 83° West 13.64 chains to corner from which a Hickory 6 inches in diameter bears South 23° West 17 links and a Hickory 4 inches in diameter bears North 9° East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼° West 19 links and a Hickory 12 inches in diameter bears South 62° West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner on Morris line from which corner a post oak 10 inches in diameter bears South 14½° West 54 links, and a Black Oak 5 inches in diameter bears South 39½° East 43 links, thence East 4.14 chains to Morris Southeast corner from which a Hickory 10 inches in diameter bears North 43° West 50 links, thence North 10° West 25 chains to place of beginning, containing 94.46 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

[fol. 711] that said land is deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the property so taken is vested in the persons entitled thereto, and the amount of just compensation for said land involved in this condemnation proceeding, shall be ascertained and awarded in said proceeding and established by judgment herein pursuant to law, and

It Is Further Ordered And Adjudged that the possession of said lands shall be immediately surrendered to the United States of America.

This cause is held open for the entry of such other and further orders and judgments as may be just and equitable in the premises.

Entered on this 15th day of April, 1941.

(s) CHARLES B. DAVIS,
United States District Judge.

[fol. 712] United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, Et Al., Defendants.

Order Transferring Fund From the Declaration of Taking in Case No. 854.

(Filed April 15, 1941.)

It appearing to the Court that in the Declaration of Taking filed with Case No. 854 on April 14th, 1941, there was paid into the Registry of the Court as estimated compensation for Tract No. 19, described in the petition filed herein, the amount of $3,460.00;

On oral motion of the United States Attorney, the Clerk of this Court is directed to transfer $3,460.00, of the whole amount deposited under the Declaration of Taking heretofore filed, to this cause for the use and benefit of the defendants entitled thereto as to Tract No. 19.

(s) CHARLES B. DAVIS,
United States District Judge.

[fol. 713] United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, Et Al., Defendants.

Answer.

Defendants William M. Andrews and Bertha L. Andrews.

(Filed June 2, 1941.)

Come now William M. Andrews and Bertha L. Andrews, wife of William M. Andrews, defendants in the above entitled cause, by their attorneys, and, in answer to the petition of the plaintiff herein, deny each and every allegation therein contained.

Answering further, the said defendants state that because of the hereinafter stated possession and ownership in fee simple by the plaintiff of the land described in the said

petition, the said land was removed entirely and permanently from the buying market prior to the filing of the plaintiff's petition herein; that the said land at the date of such filing thus neither had, nor could have had, a reasonable value on the buying market; that the absence of such reasonable value renders impossible the ascertainment thereby of the amount of just compensation for the said land; that there is an utter absence of any precedent in the light of which the amount of such compensation may be determined; that such amount is impossible of ascertainment and, therefore, cannot be paid into the Registry of this [fol. 714] Court; and that thus the prime requisite of this proceeding and of its alleged Declaration of Taking utterly fails.

Answering further, the said defendants state as follows, to-wit:

1. That the plaintiff's petition is inconsistent within itself in that it provides for the condemnation of the said land under Title 40, Section 257 of the United States Code, and under Title 50, Section 171 of the United States Code.

2. That Title 40, Section 257, United States Code, does not provide for the condemnation of land for an ordnance plant as set out in the plaintiff's petition.

3. That the plaintiff, under Title 50, Section 171, United States Code, has entered with the defendants into a valid contract which provides for the sale of the same land as that described in the said petition and which was duly accepted by and on behalf of the plaintiff by its duly authorized agent, which said contract, omitting the signatures thereto, is in words and figures as follows, to-wit:

"W 766 QM
2585

Option to Purchase Land

Know All Men By These Presents: That the undersigned Wm. M. Andrews and Bertha L. Andrews, his wife, for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell

and convey to the Government for the consideration of Twelve Thousand and no/100 Dollars ($12,000.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

Lot No. Four (4) being part of Survey No. 887 and part of the Northwest quarter of Section 26 of Township 46 North, Range 2 East, is described and bounded as follows:—Beginning at the Northwest corner of said lot a stone from which a Hickory 8 inches in diameter bears South 22 degrees E. 43 links, and a hickory 6 inches in diameter bears North 87 degrees E. 46 links, thence North 80 degrees E. 21.78 chains to corner, from which a White Oak 30 inches in diameter bears South 60 degrees East 39 [fol. 715] links and a White Oak 30 inches in diameter bears South 47½ degrees West 57 links, thence South 10 degrees East 29.75 chains to corner from which a White Oak 8 inches in diameter bears North 69½ East 49 links and a Black Oak 10 inches in diameter bears North 62½ degrees West 20 links, thence South 83 degrees West 13.64 chains to corner from which a Hickory 6 inches in diameter bears South 23 degrees West 17 links and a Hickory 4 inches in diameter bears North 9 degrees East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼ degrees West 19 links and a Hickory 12 inches in diameter bears South 62 degrees West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner on Morris line from which corner a post oak 10 inches in diameter bears South 14½ degrees West 54 links, and a Black Oak 5 inches in diameter bears South 39½ degrees East 43 links, thence East 4.14 chains to Morris Southeast corner from which a Hickory 10 inches [a] diameter bears North 43 degrees West 50 links, thence North 10 degrees West 25 chains to place of beginning, containing 94.46 acres, more or less.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for

the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish without cost to the Government, a certificate of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America, free of all liens and encumbrances. In the event the title shall be unmerchantable, the undersigned agrees to make said title merchantable at his own expense.

[fol. 716] Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon fil-

ing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in [triplicated] at St. Louis, Missouri, this 19th day of Nov., 1940.

(Signed) WILLIAM M. ANDREWS,

(Signed) BERTHA L. ANDREWS.

Witness:
(Signed) Paul E. Williams
(Signed) Paul E. Williams

Accepted by and on behalf of the United States of America this 27th day of Nov., 1940.

(Signed) R. D. VALLIANT,
Colonel, Q. M. C.
United States Army."

4. That pursuant to the said contract the defendants granted possession of the said land to the plaintiff, and the plaintiff entered upon and took sole and complete possession thereof to the exclusion of the defendants, which possession has been continuous and still continues.

5. That pursuant to the said contract, the defendants caused a certificate of title to said land to be furnished the plaintiff.

6. That pursuant to the said contract the defendants executed a warranty deed conveying the said land to the plaintiff and delivered the said deed to the plaintiff through its duly authorized agent.

[fol. 716A] 7. That the plaintiff, by taking under the said contract the title to and the possession of the said land, has estopped itself from denying the validity of the said contract.

8. That the plaintiff, by entering into the said contract and by estopping itself from denying the validity thereof, is

precluded from availing itself of condemnation under the said Title 50, Section 171, United States Code, except under the contingency, specified in the said contract, of non-approval by the Attorney General of the title to the said land, a contingency whereon the instant proceeding is not predicated.

9. That said warranty deed delivered to plaintiff through its duly authorized agent, the Kansas City Title Insurance Company, was duly recorded in the office of the Recorder of Deeds of the County of St. Charles and State of Missouri.

10. That when said warranty deed was recorded, as aforesaid, the Kansas City Title Insurance Company was in a position to make final certificate of title showing title in fee simple vested in the United States of America.

11. That by letter under date of January 22, 1941, C. J. Harrold, Major, Q. M. C., Assistant, acting for plaintiff herein, transmitted a check to the aforesaid Kansas City Title Insurance Company in St. Charles, Missouri, for the sum of Twelve Thousand Dollars ($12,000.00), being the amount payable to these defendants for the aforesaid land under the aforesaid contract, said check being No. 796379 and being payable to the order of these defendants, and authorized said Company to pay said check to these defendants when said Company should be in a position to make final certificate of title.

12. That these defendants were notified by the aforesaid Kansas City Title & Insurance Company that said check was ready for payment to these defendants but [fol. 717] that before these defendants called at the office of said Company to receive payment said check was taken out of the custody of said company by one Ewing E. Wright who represented himself to be a special representative of the Department of Justice of the United States of America, and that payment of said check to these defendants was and is now being withheld from these defendants and that the plaintiff has failed and refused to pay these defendants the price which it agreed to pay under the said contract.

13. That the instant proceeding and the alleged Declaration of Taking thereunder are unnecessary, unwar-

ranted, illegal and void in view of the said possession of plaintiff and of the said delivery of warranty deed by the defendants to the plaintiff, and of the said recordation thereof, under the said contract.

14. That the plaintiff has failed and refused to pay the defendants the price which it agreed to pay under the said contract.

15. That the defendants are deprived of the said agreed compensation for their property without due process of law and equal protection of the laws in violation of Section 1, Article XIV of the Constitution of the United States, and are deprived of said agreed compensation for their property without due process of law in violation of Section 30, Article II of the Constitution of the State of Missouri.

Answering further, the defendants state that the Order and Judgment heretofore made herein on the plaintiff's alleged Declaration of Taking is an improper Order and Judgment and should be vacated and set aside by the Court for the following reasons:

1. That the said alleged Declaration of Taking heretofore entered herein, if entered under Title 40, Section 258-A, United States Code, is illegal and void in that the said Section 257 does not provide for the condemnation of land for an ordnance plant referred to in the said petition.

[fol. 718] 2. That the said alleged Declaration of Taking, if entered under Title 50, Section 171, United States Code, is illegal and void in that the plaintiff has made no showing that the said land is acquired or is being acquired "in time of war, or the imminence thereof".

3. That the said Order and Judgment is illegal and void for the reasons that fee simple title to the said land was prior thereto and now is vested in the plaintiff, and that the plaintiff took, prior to the said Order and Judgment, has held continuously, and now holds possession of the said land to the exclusion of the said defendants.

4. That the said alleged Declaration of Taking is predicated solely and entirely on the erroneously conceived and

filed petition of the plaintiff, and is, therefore, illegal and void.

5. That the said alleged Declaration of Taking is null and void for the reasons hereinbefore fully set forth in the second paragraph, beginning on page 1, of this Answer.

Wherefore, defendants pray that this Court vacate and set aside its said Order and Judgment on the said alleged Declaration of Taking, deny the plaintiff's petition for condemnation of the said land for the uses and purposes set forth in the said petition, and discharge the said defendants with their costs.

(s) SAMUEL M. WATSON,
(s) OLIVER T. JOHNSON,
Attorneys for Defendants.

[fol 719] Amended Answer Defendants William M. Andrews and Bertha L. Andrews

(Filed February 27, 1942)

Come now William M. Andrews and Bertha L. Andrews, defendants in the above entitled cause, by their attorney, and in this their Amended Answer, filed by leave of Court, to the petition of the plaintiff herein, deny each and every allegation therein contained.

Answering further, the said defendants state as follows, to-wit:

1. That on, to-wit the 27th day of November, 1940, and prior to the filing of the within condemnation suit, the plaintiff herein, under Title 50, Section 171, U. S. Code, entered with these defendants into a contract, a copy of which is attached hereto marked "Exhibit A" and by reference made a part hereof, whereby these defendants agreed to sell and plaintiff agreed to purchase and pay for a certain tract of land therein described, being the same land described in plaintiff's petition herein, at a price of $12,000.00, and whereby the defendants granted to the plaintiff the right of immediate occupancy and use of said land until such time as the landowners should convey said land to the United States of America, the title thereto be

approved by the Attorney-General, and the purchase price be paid therefor, and whereby the defendants agreed to convey said land to plaintiff by general warranty deed and to furnish a certificate of title showing good and marketable title, and whereby defendants agreed that if the title should be unmerchantable defendants would make same merchantable at their own expense, and whereby it was further provided that if, for any reason, the Attorney-General should fail to approve the title, the plaintiff should proceed to acquire the same by condemnation proceedings under a consent verdict fixing the award at the valuation [fol. 720] agreed upon as the purchase price, and that plaintiff, upon filing such proceedings, should deposit the agreed purchase price with the Clerk of the Court, same to be disbursed pursuant to the decree to be entered in the condemnation proceeding, and whereby it was further provided that in the event of the filing of such proceeding for such reason, the occupancy and use of the land granted in said contract should not be interrupted but should continue to be enjoyed by the Government throughout the pendency of said proceeding, and whereby it was further provided that upon furnishing of final certificate of title showing title to be vested in the United States of America. the agreed purchase price above mentioned would be paid by the Government to the undersigned (defendants herein).

2. That Schulte Brothers (Joe and Fred J.) were, at the time of the entrance by plaintiff and these defendants herein into the hereinabove alleged contract, the tenants on the land described in said contract, and that these defendants entered into a contract with said tenants whereby said tenants agreed, for a consideration of $300.00, to deliver possession of the aforesaid property upon acceptance by the United States of America of the above alleged contract between it and these defendants.

3. That pursuant to the contract first above mentioned, plaintiff entered into possession of the aforesaid land dispossessing these defendants, and these defendants and the aforesaid tenants yielded possession of said land, all on or about the 1st day of December, 1940, and that plaintiff has ever since remained in continuous and exclusive possession thereof pursuant to said contract.

4. That plaintiff, by so taking and retaining possession of said land under said contract for use as a portion of a site designated as an Army Ordnance Plant long prior to the filing of the instant condemnation proceeding, removed said land from the buying market prior to the filing of the petition herein; and that said land, at the date of said filing, thus neither had nor could have had a reasonable value on the buying market; and that the absence of such reasonable value renders impossible the ascertainment by commissioners of the amount of just compensation for said land; and that there is an utter absence of any precedent in the light of which commissioners might determine what said compensation should be.

[fol. 721] 5. That pursuant to said contract, the defendants caused a certificate of title to said land to be furnished to plaintiff and executed a warranty deed conveying the said land to the plaintiff and delivered the said deed to the plaintiff through its duly authorized agent, The Kansas City Title Insurance Company.

6. That said warranty deed was, with the full knowledge of plaintiff herein and pursuant to plaintiff's instructions, duly recorded in the office of the Recorder of Deeds of the County of St. Charles of the State of Missouri, and that the record title to the property described therein thereupon vested in plaintiff herein subject, however, to the liens and encumbrances shown by the aforesaid certificate of title, which last mentioned liens and encumbrances defendants have ever stood and now stand ready to discharge upon payment of the aforesaid sum of $12,000.00 by plaintiff for said land in accordance with the provisions of the aforesaid contract, which said sum is more than adequate to discharge said liens and encumbrances and against which said liens and encumbrances these defendants did, in the warranty clause of the aforesaid deed, warrant to defend the title of plaintiff herein to said land conveyed by said deed.

7. Defendants, answering further, say that plaintiff, by taking under said contract the title to and possession of said land, has estopped itself from denying the validity of said contract and has elected to acquire said land by purchase, and is precluded from availing itself of condem-

nation for the acquisition of said land except for the purpose of clearing the title.

8. And defendants, answering further, say that the entrance by plaintiff into the aforesaid contract was an exercise by the Secretary of War of his discretion under Title 50, Section 171, to determine the reasonable purchase price of the land, which discretion is not reviewable by the Court or by a condemnation jury or board of commissioners.

9. And defendants say that the proper and correct meaning of the hereinabove mentioned provision of the aforesaid contract, reading as follows:

"Upon furnishing of final certificate of title as above, showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned"

is that the action of defendants in furnishing said final certificate was to be practically simultaneous with the action of plaintiff in paying the agreed purchase price, [fol. 722] and defendants say that for the carrying out of this provision of said contract the services of a third party, acting in an escrow capacity or quasi escrow capacity, were essential in order that the United States of America might be sure that this money, in the amount of the contract price, would not be paid out without the simultaneous removal of all liens and encumbrances on the title to the land conveyed, and also in order that the said amount of money might be available for and used in part for the discharge of said liens and encumbrances, and defendants say that the United States of America so construed said contract and constituted the Kansas City Title Insurance Company such an escrow agent by establishing the custom established by it in the closing of sales under similar contracts in the Weldon Spring Ordnance area, as hereinafter alleged, and defendants say that after said deed was recorded, as aforesaid, they were ready to follow plaintiff's said custom and to furnish a final certificate of title prepared by the Kansas City Title Insurance Company, as required by said contract, showing title to said land to be vested in the United States of America as soon as the purchase price should be available; but defendants say that on, to-wit, February 7, 1941, plaintiff ordered that payment of said

contract price be withheld from defendants and has ever since failed and refused to pay said contract price, and defendants say that they were thereby prevented by plaintiff, through no fault of their own, from furnishing said final certificate of title, and defendants say that they now stand ready and have ever stood ready to furnish said final certificate of title upon the simultaneous payment of the aforesaid consideration of $12,000.00.

10. And defendants, answering further, say that after said deed was recorded as aforesaid they were ready to furnish a final certificate of title prepared by the Kansas City Title Insurance Company, as required by said contract, showing title to said land to be vested in the United States of America, but that plaintiff on, to-wit, February 7, 1941, ordered payment under said contract stopped and never took further steps thereafter with a view to carrying out said contract.

11. Defendants say that the Attorney-General, in a written opinion addressed to the Secretary of War, approved the title to said land subject to certain specified encumbrances, and that all of the requirements of the said title opinion of the Attorney-General could have been met and all of said liens and encumbrances could have been discharged immediately from the proceeds of the contract [fol. 723] price above mentioned and such money been made available and the balance remaining thereafter could have been paid to these defendants, all in accordance with the procedure and custom established by the practice that had been followed for payment for land under similar contracts of purchase in connection with the Weldon Spring Ordnance Plant whereby the Kansas City Title Insurance Company, acting, under such similar contracts, in an escrow capacity with the acquiescence of plaintiff, procured the endorsement of the check for payment in the respective cases by the payee or payees, but withheld possession of the proceeds thereof from the payee until separate drafts were issued by the First National Bank in St. Charles for the discharge of encumbrances and until said encumbrances were paid off, the balance of the proceeds of said check being thereafter paid in full to the payee or payees and his, her or their receipt or receipts for settlement in full being procured.

12. And defendants, answering further, say that plaintiff, after withholding payment of said contract sum of $12,000.00 as payment for said land, and utterly ignoring said contract and all the provisions thereof, through its Attorney-General and District Attorney, filed the instant condemnation proceeding seeking a judgment in condemnation vesting title in the United States of America and praying that compensation for the land be determined by three disinterested commissioners to be appointed by the Court, and that plaintiff joined as defendants in said condemnation proceeding those encumbrancers and lienholders whose encumbrances and liens had been mentioned in the aforesaid opinion of the Attorney-General, and which encumbrances and liens could and should have been removed by the payment thereof from the proceeds of said contract price.

13. Defendants, answering in the alternative, say further that they verily believe and here aver that either:

First, because of the entrance into said contract of purchase and sale of said land by the parties thereto, equitable title to said land immediately vested in the United States of America subject to the obligation to pay the contract price therefor, and because of the compliance by the defendant with the terms of said contract, including delivery of the required deed and recordation of same, with the knowledge and acquiescence of plaintiff, and further because of the approval of title by the Attorney-General, [fol. 724] legal title to said land vested in plaintiff subject to the encumbrances mentioned in said title opinion; and further that because of the certainty that said encumbrances could be removed by payment thereof from the proceeds of the contract price, above alleged, the plaintiff owned the said land before the instant condemnation suit was instituted and had a contract created means of bringing about the removal of all encumbrances, and that, plaintiff owning said land, there is no title in defendants or any other person to be divested out of these defendants or any other person or persons, and that the within proceeding and all interlocutory orders entered therein should be dismissed and defendants herein discharged hence with their costs. Or,

Second, that the entrance by the parties thereto into the aforesaid contract did not transfer equitable title to said land to plaintiff herein, and the delivery and recordation of the aforesaid deed and the rendition of the opinion of the Attorney-General, approving title subject to encumbrances, did not vest legal title to said land in plaintiff and condemnation is essential to the acquisition of title by plaintiff, and that in said condemnation proceedings plaintiff is subject to the above alleged consent verdict provision of the above alleged contract and that the consideration fixed in said contract as the purchase price of the above mentioned land should be fixed as the amount of compensation in the within condemnation proceeding as an agreed amount of compensation under the aforesaid consent verdict provision, and that the judgment in condemnation should vest fee simple title to said land in the United States of America upon and only upon the fixing in said judgment of said amount as the amount of compensation for said land. Or,

Third, that it was the duty of plaintiff under said contract, after entrance into same and after compliance therewith by defendants herein and approval of title to said land by the Attorney-General, to complete the purchase of said land; but that plaintiff, notwithstanding said duty, elected to repudiate said contract and to attempt by the process of condemnation to acquire said land at a price different from the price fixed in said contract; and that plaintiff, by so electing and by instituting the within proceeding for said purpose, subjected itself to the processes of condemnation and to the aforesaid consent verdict provision of said contract, and that judgment should be entered herein fixing the compensation at $12,000.00, the amount agreed upon as the purchase price in said contract, plus interest at 6% [fol. 725] per annum on said sum from the date upon which plaintiff took possession under said contract to April 15, 1941, the date upon which $3460.00 was paid into the Registry of the Court, plus interest at said rate from April 15, 1941, on $8540.00 to the date upon which said last mentioned sum shall be paid into Court.

And defendants, answering further, say that defendants are ignorant as to which set of facts hereinabove pleaded

in the alternative is true and correct, but defendants verily believe one of said three statements of fact to be true.

14. Answering further, defendants say that if the second or third alternative hereinabove pleaded be the true statement of facts, defendants are entitled to interest from the 1st day of December, 1940, the date upon which the plaintiff herein took possession under the aforesaid contract, as above alleged, to April 15, 1941, at the rate of 6% per annum on the sum of $12,000.00 plus interest at said rate on $8540.00 from April 15, 1941, to the date upon which the further sum of $8540.00 shall be paid into Court, said last mentioned sum being the difference between the aforesaid contract price and the aforesaid amount of money paid into Court on April 15, 1941.

Wherefore, defendants, in the alternative, pray that either:

First, the within condemnation proceeding, together with all interlocutory orders entered in connection herewith be dismissed and that these defendants be discharged hence with their costs. Or,

Second, that the prayer in plaintiff's petition for the appointment of commissioners to fix compensation be denied and that the Court enter judgment in the within condemnation proceeding vesting fee simple title to said land in plaintiff and awarding compensation in the amount of $12,000.00 as a consent verdict fixed in accordance with the agreement between these defendants and the plaintiff herein embodied in the aforesaid contract as to the amount of compensation for said land, and awarding an additional amount which shall amount to 6% of $12,000.00 from the 1st day of December, 1940 to April 15, 1941 as interest, and an additional sum amounting to 6% on $8540.00 from April 15, 1941 to the date upon which said sum of $8540.00 shall be paid into Court, as interest.

(s) SAMUEL M. WATSON,
Attorney for Defendants William
M. Andrews and Bertha L. Andrews.

[fol. 726] Plaintiff's Amended Reply to the Amended Answer of Defendants William M. Andrews and Bertha L. Andrews.

(Filed April 3, 1942.)

1. Comes now the plaintiff, the United States of America, by Harry C. Blanton, United States Attorney, Russell Vandivort, Assistant U. S. Attorney, and Drake Watson, Special Assistant U. S. Attorney and for its reply to the amended answer of defendants William M. Andrews and Bertha L. Andrews, filed herein on February 27, 1942, by their attorney of record, Samuel M. Watson, states that the *plaintiff is not informed as to the truth of the allegations* contained in said above mentioned answer and for lack of information denies each and all of the allegations therein contained and asks that the defendants be placed on strict proof thereof, and denies the conclusions of fact and of law therein stated.

2. Further replying, plaintiff states that if a purported option to purchase the land described in the petition herein was signed by the defendants by which they purported to agree to convey to the plaintiff said real estate and if thereafter said defendants did execute and deliver a general warranty deed to the Kansas City Title Insurance Company purporting to convey said land to plaintiff, and if said deed was thereafter placed of record in the Recorder's Office of St. Charles County, Missouri, that the same was done without the knowledge, consent, authority or approval of the plaintiff.

3. Plaintiff further states that one R. Newton McDowell and R. D. Valliant fabricated, designed and conceived a scheme to defraud the plaintiff and to cause the plaintiff to believe that the real estate comprised within the Weldon [fol. 727] Springs Ordnance Project and consisting of approximately 18,000 acres, was of the fair and reasonable market value greatly in excess of its actual and true market value;

(a) That said McDowell, as a part of said design and scheme, procured a purported agreement with the War Department of the United States of America, by the terms of which said purported agreement said R. Newton

McDowell was to procure options to purchase on behalf of plaintiff from all the owners of the real estate comprised within said Weldon Springs Ordnance Area and was to procure said options upon a certain designated form entitled "Option to Purchase Land" from the respective owners of the various parcels of land therein located and said "Options to Purchase Land" were to contain offers by the owners of the lands offering to sell said lands for the fair and reasonable market value thereof;

(b) That by said option agreements it was provided that said McDowell was to receive as compensation to himself for procuring options on said real estate, the sum of five per cent of the option price as called for in said option agreements;

(c) That said McDowell pursuant to said scheme did thereafter and in the year 1940 and early part of the year 1941, procure from the various land owners of the lands located within said Weldon Springs Ordnance Area, purported options on said land and a purported option on the land described in the petition herein;

(d) That the said McDowell by the purported option so procured by him and covering the land described in the petition herein, represented to the plaintiff that the amount named in said option was the reasonable and fair market value of said real estate;

(e) That said McDowell likewise, in pursuance of said scheme and in order to unjustly enrich himself, and by resorting to unfair and fraudulent methods and in violation of his duty to the plaintiff, procured purported options [fol. 728] on all of the land located in said Weldon Springs Ordnance Area at prices which were far in excess of the reasonable and fair market value thereof; the procuring of said above mentioned purported options on the particular tract described in the plaintiff's petition being only a part of the scheme so designed by said McDowell in his said effort to defraud the plaintiff, United States of America;

(f) That pursuant to said scheme so designed by said McDowell, said McDowell procured the assistance and active cooperation of other parties in representing to the

plaintiff that the price named in the various options covering said Weldon Springs Ordnance Area was the fair and reasonable market value thereof;

(g) That the land owners, including these defendants, and said McDowell did represent to the plaintiff that the price or consideration named in the said various purported options and in the alleged option entered into in this case, was the fair and reasonable market value of the lands covered or purported to be covered by said option agreements and by the purported option agreement covering the land described in the plaintiff's petition herein;

(h) That pursuant to said plan so conceived, said land owners as to the parcel of land described in the petition herein and the signers of the alleged options covering the other land located in said Weldon Springs Ordnance Area, represented and likewise said McDowell represented to the plaintiff that said amounts were the fair and reasonable market value of the real estate covered by said purported options;

(i) That the plaintiff relied implicitly upon said McDowell and upon the representations said McDowell made to the plaintiff and reposed in him special confidence and trust and believed that the representations he so made as above set forth to the plaintiff were true and believed that he was procuring, on the part of the plaintiff and for the plaintiff, said real estate at no more than the fair and [fol. 729] reasonable market value thereof;

(j) That the plaintiff never obtained or procured or had furnished to it or had access to any appraisement of any of said real estate prior to the purported acceptance of the purported option describing the land which is described in plaintiff's petition herein and never procured from said McDowell any bond or assurance of any sort whereby the plaintiff would be safeguarded or protected against fraudulent, faithless or unlawful representations or acts of said McDowell in procuring said real estate or any part thereof;

(k) That said McDowell and the defendants herein well knew that said real estate described by the purported option herein was represented to the plaintiff to be of a value

greater than and greatly in excess of its fair and reasonable market value and with the full knowledge that said real estate was of the reasonable market value of only a small fraction of the value as stated in said purported option. That they also knew that the plaintiff was relying on the said representations as being true; that said false representations were so made to the plaintiff with the intent on the part of the makers of said representations, including said McDowell and said defendant William M. Andrews and Bertha L. Andrews, that the plaintiff rely upon the same; that the plaintiff did rely upon the same and did believe that the said R. Newton McDowell was faithfully and efficiently acquiring the property described in the petition herein at a price that was not more than the fair market value thereof;

(l) That if the purported option covering the tract of land described in the plaintiff's petition herein was signed by any official on behalf of the plaintiff Government, it was so signed without any knowledge of the value of said lands or of the value of the land described in plaintiff's petition [fol. 730] herein except such knowledge as is hereabove set forth;

(m) That if said purported option as to the tract of land described in the petition herein was purportedly signed by any official purporting to act for the plaintiff Government herein thereon, such so signing was purely an arbitrary act on the part of such official, that it was an act beyond the power or authority of said official to so bind or obligate the plaintiff Government. That it was in wanton and reckless disregard of the preservation of the rights and interest of the plaintiff Government and was in reliance upon the truth of the representations as hereabove set forth made to the plaintiff Government, when in fact those said representations were false;

(n) That during the time hereinbefore mentioned, one R. D. Valliant, Colonel, Quartermasters Corps, was the Chief of Real Estate Branch, Construction Division, Office Quartermaster General and was the person who originally contracted with said McDowell to secure said alleged options from the said landowners, said R. D. Valliant being also the person to whom said purported options were to be

submitted by McDowell for approval and acceptance on behalf of the plaintiff.

(o) That the defendant herein, said R. Newton McDowell and said R. D. Valliant did conspire and agree to cause, and did cause to be included in the option price of the land which is being condemned herein, and did cause to be included in the option price of the other land in the Weldon Springs Ordnance Area, not only the reasonable value as represented by the owner, but in addition thereto, the five per cent (5%) commission to be received by McDowell, plus a one and one-half per cent (1½%) fee to be received by the Kansas City Title Insurance Company, said amounts being secretly included in the prices named in said purported options in spite of the fact that said purported option agreements specifically provided that said commission and fee were to be paid by the vendor.

[fol. 731] (p) That the fact that said commission and said fee were secretly included in the prices named in said purported options was a fraud upon plaintiff in that the defendants herein, McDowell and Valliant, by so including said amounts, represented to plaintiff and led plaintiff to believe that said prices set forth in said purported options were the reasonable value of the land and that said option prices did not include said commission and fee, whereas in truth and fact the prices named in said purported options did include said fee and commission, and said prices were in excess of the reasonable value of the land by the amount of said fee and commission, as well as being in excess of the reasonable value thereof for the other reasons hereinbefore set forth.

(q) That said fraudulent misrepresentations on the part of the defendants, McDowell and Valliant were relied upon by plaintiff to its damage and caused the acquisition of the land herein by plaintiff to be delayed for a considerable length of time and necessitated additional expenses on the part of plaintiff in connection therewith.

(r) That said fraudulent misrepresentations were a breach of the fiduciary duty which said R. D. Valliant and said R. Newton McDowell owed to plaintiff as its officer and agent, respectively, and that said misrepresentations

were a breach of the fiduciary duty which the defendants herein owed plaintiff as its citizens.

(s) That the defendants seek in this case to take advantage of, and profit by, and to reap a reward by reason of all of the fraudulent and illegal acts hereabove and hereafter stated.

4. For its further reply to the amended answer of defendants William M. Andrews and Bertha L. Andrews, plaintiff denies that the plaintiff and the defendants entered into any valid binding contract for the purchase of the land described in plaintiff's petition herein, but admits that plaintiff has declined to pay the amount set forth in said alleged option contract, but plaintiff states that it [fol. 732] stands ready and is now willing and able to pay the reasonable value of the land which is being condemned in these proceedings.

[fol. 733] 5. Further replying, plaintiff states that said alleged option is illegal, void and unenforcible because it is contrary to the provisions of the Act of July 2, 1940, 54 Stat. 712, as amended, entitled "An act to expedite the strengthening of the national defenses", which prohibits the use of "the cost plus-a-percentage-of-cost system of contracting", said alleged option being contrary to said provision for the following reasons:

(a) That said alleged option shows on its face that the commission to be paid R. Newton McDowell as agent for the Government, is increased by an increase in the option price of the land, thus putting a premium on inflated prices and causing the very evil at which said provision of said Act is directed:

(b) That said alleged option shows on its face that its terms are an illegal attempt to evade by subterfuge the said provision of said Act, in that said alleged option purports to evade the prohibition against a "cost-plus-a-percentage-of-cost" contract by illegally achieving the same result in a "cost-plus-a-percentage-of-cost-to-be-paid-by-the-vendor" contract, it being apparent that the latter arrangement is objectionable for the same reason as the former.

(c) That the defendants herein, said R. D. Valliant and said R. Newton McDowell did conspire and agree to cause, and did cause to be included in the option price of said land not only the cash market value, as represented by the owner, but in addition thereto the five per cent (5%) commission to be received by said McDowell, plus a one and one-half per cent (1½%) fee to be received by the Kansas City Title Insurance Company, so that the said alleged option became in truth and fact a "cost-plus-a-percentage-of-cost" contract, and it is therefore contrary to the express provisions of said Act.

(d) That in addition to being illegal and void because it is contrary to the above Act, said alleged option is also illegal and void as being against the public policy expressed by the following Acts of Congress, all of which prohibit the use of the "cost-plus-a-percentage-of-cost system of contracting";

Sec. 2 (a) (1) of the Act of June 28, 1940, 54 Stat. 676

Sec. 1 (a) of the Act of July 2, 1940, 54 Stat. 712

Sec. 2 (c) of the Act of May 2, 1941, 55 Stat. 148

Sec. 201 of Title II of the Act of December 18, 1941, known as "The First War Powers Act, 1941", approved December 18, 1941.

[fol. 734] 6. For its further reply, plaintiff denies that the instrument described as "Option to Purchase Land" set out in full and attached by defendants to their amended answer herein and described as their "Exhibit A" constitutes any valid contract with said defendants William M. Andrews and Bertha L. Andrews, either under Title 50, Section 171 U. S. C., or any other Statute or law of the United States or of the State of Missouri and denies that said last designated document was accepted by any agent of the plaintiff authorized and empowered to bind the plaintiff, and denies that said document constitutes any enforcible, binding, valid agreement requiring the plaintiff to pay to the defendants the amount set out in said document for the following reasons:

(1) That said alleged option is invalid, void and unenforcible because it fails to contain the provision set

forth in Section 22 of Title 41, U. S. C., as amended which requires that:

"In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon. Nor shall the provisions of this section apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act (Title 7, chapter 26), the Federal Farm Loan Act (Title [fol. 735] 12, chapter 7), the Emergency Farm Mortgage Act of 1933 (Title 12, chapter 7), the Federal Farm Mortgage Corporation Act (Title 12, chapter 7), the Farm Credit Act of 1933 (Title 12, chapter 7), and the Home Owners' Loan Act of 1933 (Title 12, chapter 11), and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: Provided, That such exempton shall be made a matter of public record."

(2) That said alleged option is invalid, void, and unenforcible because it provides for the payment of the 5% commission by the property owner and not by the Government, contrary to the provisions of Section 66, Title 5 U. S. C., which provides as follows:

"No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any state, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States. Any person violating any of the terms of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $1,000 or imprisonment for not less than six months, or by both such fine and imprisonment as the court may determine."

(3) That said alleged option is invalid, void, and unenforcible because it is contrary to the rules and regulations of the Secretary of War, promulgated by the Secretary of War under the authority of Acts of Congress; said regulation being marked "Exhibit A" attached hereto and incorporated as fully as if set out herein.

(4) That said alleged option is invalid, void, and unenforcible because it was contrary to the provisions of the pertinent Federal Statutes which authorize purchase without condemnation only when the sum purported to be [fol. 736] agreed upon is the reasonable value of the land; whereas, in this case, the sum agreed upon and represented to be the reasonable cash market value of the land was $12,000.00; whereas, in truth and in fact, the reasonable cash market value of said land was only $2,820.00.

(5) That said alleged option is invalid, void, and unenforcible because it is contrary to public policy, for the following reasons:

(a) That said agreement authorizes the payment to R. Newton McDowell, who was soliciting offers to be submitted to the Secretary of War for his approval or rejection, a commission of 5% on the gross sales price, to be paid by the property owner, which was alleged to constitute the reasonable cash market value of the land, which provision constituted an inducement to said R. Newton McDowell to recommend to the Secretary of War an inflated, improvident, and excessive price; and which provision was wholly inconsistent with the duty of the said R. Newton McDowell to procure options at the lowest fair cash market value of said property for the Government:

(b) That said alleged option agreement because of such provision constituted a contingent brokerage contract which would have a tendency, first: to cause said R. Newton McDowell to recommend an inflated, excessive, and exorbitant valuation; and second: would have a tendency to cause the said R. Newton McDowell to use oppressive, improper, and corrupt methods to procure said options in order that he might obtain his contingent brokerage commission.

(c) That said R. Newton McDowell undertook to act in a dual capacity, and undertook at one and the same time to represent faithfully the United States Government and, at the same time, accept his pay from the property owner.

[fol. 737] (d) That the said alleged and purported option agreement was not negotiated directly between the defendant owner and the Government, but through the intervention of a third party intermediary, who attempted to act in a dual capacity, ostensibly representing the Government, but actually representing the property owner and himself, in order that his personal commissions might be increased at the expense of the Government to whom he owed his first loyalty and toward which he occupied a position of trust.

(e) That the price set out in the purported contract is excessive and unconscionable in that it would require the payment of $12,000.00 for the land which, in truth and in fact, was worth only the sum of $2,820.00: and for the plaintiff to pay said optioned amount for the taking of said land would result in a waste of public money and in the violation, by the plaintiff, of its duty to its citizens to see that no more than just compensation is paid for land taken by plaintiff for public use.

(6) That said alleged option is invalid, void, and unenforcible because it was so improvident and so unfair to the Government that it ought not, in equity and in good conscience, be called upon to perform thereunder, in this, to-wit:

(a) That, while the option offer provided for the payment of $12,000.00, the true cash market value of said property was $2,820.00.

(b) That the amount contained in said option offer included, as elements of value, certain elements which were improper elements of value or damage, in that, to-wit: there were included in said figure disturbance factors, expenses of removal, replacement value, allowances to tenants, damages for growing crops.

[fol. 738] (7) That said alleged option is invalid, void, and unenforcible because said contract is constructively, if not actually, fraudulent for the following reasons:

(a) That R. Newton McDowell, the alleged dual agent of the plaintiff, the defendants, and R. D. Valliant, represented to the Secretary of War and his duly accredited representatives acting for and in behalf of the plaintiff, that the figure submitted in said option offer was the actual reasonable cash market value of said land; whereas, in truth and in fact, he, the said R. Newton McDowell, and the said defendants both knew that the said figure contained certain elements and factors which did not properly constitute any elements of actual cash market value, in that it contained to-wit: disturbance factors, expenses of removal, replacement value, allowances to tenants, damages for growing crops, etc.

(b) That the said R. Newton McDowell, the alleged dual agent of both the plaintiff and the said defendants, and the said defendants represented the figure submitted to the plaintiff as the reasonable cash market value of said property to be $12,000.00; whereas, the said R. Newton McDowell and the said defendants, in truth, and in fact, knew that the amount was not the reasonable cash market value of the property, but it was worth only the sum of $2,820.00.

(c) That, although the said R. Newton McDowell, the alleged dual agent of the plaintiff and the said defendants, and the defendants represented the value of this property to be $12,000.00, they and each of them knew that the Secretary of War and his accredited representatives had, at that time, no appraisals of said property and were utterly dependent upon the good faith of the said dual agent [fol. 739] and the defendant in representing the valuation of the property to the plaintiff; and that, because of said lack of appraisals and knowledge about the value of said property, the plaintiff's representatives were imposed upon by the said defendant owners and the dual agent, R. Newton McDowell, in misrepresenting the value of said property, and relied wholly upon said misrepresentations.

(d) That, as an agent for both the property owner and the Government, the said R. Newton McDowell, was required to exercise an utmost good faith and frankness in dealing with both parties, and required to have no secret understanding or agreement, and was prohibited

from receiving any secret profits as a result of his said alleged agency but, notwithstanding said obligation on the part of said R. Newton McDowell, as was well known to the said defendants, the said R. Newton McDowell with knowledge, consent, and approbation of the defendant did not submit to the Secretary of War, for acceptance or rejection, a figure representing the actual cash market value of said property, but submitted a figure purporting to represent that cash market value, but which in truth and in fact constituted a figure containing not only the cash market value as represented by the owner but, in addition thereto, the 5% commission to be received by the said R. Newton McDowell plus 1½% to be received by the Kansas City Title Insurance Company, so that the amount so submitted did not actually represent the value of said property, but included these two additional improper elements, as was well known to the said defendants, but was unknown to the plaintiff, with the result that, in truth and in fact, the 5% commission to be paid to said R. Newton McDowell and the 1½% to be paid to the Kansas City Title Insurance Company was actually to be paid by the Government, and not by the property owner, as provided in said alleged option agreement; and for the [fol. 740] further reason that it was a secret practice of the said R. Newton McDowell, known to these said defendants herein and to the other owners in this area, but unknown to the plaintiff and its representatives, that when disbursing the checks received in settlement of certain purchases the said R. Newton McDowell not only charged the Government with the commission, as aforesaid, contrary to the said alleged option agreement, but also undertook to charge commission upon commission, to the obvious disadvantage of both the owner and the plaintiff.

(c) That the said R. Newton McDowell adopted the system of spotting his options and of placing inflated valuations upon said properties, with the aid and cooperation of these said defendants and other owners in said area, which had the inevitable effect of inducing other owners, owning the land in the vicinity of the lands contained in such spotted options, to increase the prices asked for the land; and that this practice was indulged in with

the knowledge and consent of this defendant and other owners.

(f) That the said R. Newton McDowell, with the knowledge and consent of the property owners including these said defendants, has not been faithful to the trust imposed upon him as the aileged agent of the plaintiff, in that, he, the said R. Newton McDowell, has sought to stir up litigation against the plaintiff, has recommended the employment of attorneys to that end, and has failed and refused to attempt to renegotiate contracts on a more reasonable basis, and has permitted personal considerations to enter into the prices submitted by him to the War Department.

[fol. 741] (g) That there is such a gross disparity between the actual cash market value of the land involved in this proceeding, and the amount set out in said option that the Government ought not to be required to perform thereunder, in this, to-wit: that, while the cash market value of said land is set forth in said alleged option agreement as $12,000.00, in truth and in fact, said land was worth only the sum of $2,820.00.

(8) That the said contract is invalid, void, and unenforcible for the reason that at the time said alleged acceptance of said offer was executed by an alleged representative of the Government, it was entered into as a result of a unilateral mistake of fact, in this, to-wit: that, while the plaintiff without any knowledge of the actual cash market value of this property, and in the mistaken belief that the property involved in this suit possessed such reasonable cash market value of $12,000.00, these said defendants knew that, in truth and in fact, said property was not worth that amount, but was worth only the sum of $2,820.00, and that these said defendant owners ought not to be permitted to take advantage of this mistake on the part of the alleged representative of the plaintiff in assuming that the property was reasonably worth the amount set out in said option.

(9) That the said contract in invalid, void, and unenforcible for the reason that there is such a gross disparity between the actual cash market value of the land involved in this proceeding, and the amount set out in

said option that the Government ought not to be required to perform thereunder, in this, to-wit: that, while the cash market value of said land is set forth in said alleged option agreement as $12,000.00, in truth and in fact, said land was worth only the sum of $2,820.00.

[fol. 742] (10) That the said alleged option is invalid, void, and unenforcible because to enforce said option contract would compel a breach of duty which both the plaintiff and the said defendant owners owe the public and the tax payers.

(11) That the said alleged option is invalid, void, and unenforcible because of the fiduciary relationship which should exist, and does exist, between all citizens, including these defendants and their Government; and which would be violated by the payment to these said defendant property owners of the exorbitant price named in said alleged option agreement.

(12) That the said alleged option is invalid, void, and unenforcible because it was signed only by William M. Andrews and Bertha L. Andrews and not by all the parties having an interest in and to said land, and that in addition to the said defendant (s) so signing having an interest in the land described in plaintiff's petition the following non-optioning parties had an interest in said land, to-wit:

Collector of Revenue of St. Charles County, Missouri,

St. Charles County, Missouri

L. R. Freeman, doing business as Freeman Bros. Stove Co.

Joe Schulte

Fred Schulte

[fol. 743] (13) Plaintiff states that Defendants by said amended answer set up a counter claim against the United States Government, Plaintiff herein, which is contrary to law and that said counter claim cannot be maintained by these defendants by answer in this condemnation proceeding.

Plaintiff further states that said defendants by their said amended answer seek to recover in this Court a sum

greater than $10,000.00, to-wit: $12,000.00 and this Court does not have jurisdiction to render judgment against the plaintiff in this cause and plaintiff pleads, as a defense to the defendants' amended answer, that this Court does not have jurisdiction to entertain, pass upon, or decide the matters involved in defendants' amended answer.

Wherefore, having fully replied to the matters set out in defendants' amended answer, the plaintiff prays that said option contract, and said deed, if such there be of record purporting to convey to plaintiff the lands involved herein, be cancelled, set aside, and held for naught; or, in the alternative, that said purported option agreement and said last above mentioned deed, if any there be, be held to be null, void and unenforcible against the plaintiff; that commissioners be appointed to assess the reasonable cash market value of said land; and for other and further relief as to the Court shall seem meet and proper.

(s) HARRY C. BLANTON,
United States Attorney

(s) RUSSELL VANDIVORT,
Assistant U. S. Attorney.

(s) DRAKE WATSON,
Special Assistant.

Endorsed: Filed: April 3, 1942. Jas. J. O'Connor, Clerk.

[fol. 744] Plaintiff's Exhibit A.

The following provision of Supply Circular No. 76, Purchase, Storage, and Traffic Division, General Staff, War Department, August 15, 1918, as amended by Supply Circular No. 32, April 29, 1919, reads as follows:

"The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, com-

mission, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid. Provided, however, it is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods."

General Orders No. 10, War Department, dated March 10, 1921, requires the insertion of the following mandatory clause in all formal contracts used by the supply branches of the War Department, to-wit:

"Covenant against contingent fees.—The contractor warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul the contract or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fee. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business with others than the United States."

[fol. 745] As modified, this language became Article 11 of Standard form No. 32 approved by the Secretary of the Treasury on June 18, 1935, which reads as follows:

"Convenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

[fol. 746] United States of America,
Eastern Judicial District of Missouri,
Eastern Division—ss.

Affidavit.

Harry C. Blanton, being first duly sworn, upon his oath deposes and says that he is the United States Attorney for the Eastern Judicial District of Missouri; that, as such Attorney, he has read the foregoing reply and that the facts therein are true according to his best information and belief.

(s) HARRY C. BLANTON,
United States Attorney.

Subscribed and sworn to before me this 3rd day of April, 1942.

(Seal)

JAMES J. O'CONNOR,
Clerk, U. S. District Court.
By (s) Harold G. Pryce,
Deputy Clerk.

[fol. 747] United States of America, Plaintiff,
Docket No. 874. vs. At Law.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, Et Al., Defendants.

Defendants' Motion to Strike Plaintiff's Amended Reply to Defendants' Amended Answer.

(Filed April 18, 1942.)

Come now the defendants William M. Andrews and Bertha L. Andrews, by their attorney, leave of Court having

first been obtained, and file this their motion that the Court strike out plaintiff's whole Amended Reply to defendants' Amended Answer, and, as grounds for said motion, defendants say:

1. That the allegation in paragraph 3 of said Amended Reply as to the fabricating, conceiving and designing by one R. Newton McDowell and one R. D. Valliant of a scheme to defraud plaintiff by misrepresenting the value of defendants' land to plaintiff is irrelevant, immaterial and redundant insofar as said McDowell's alleged part therein is concerned, for the reason that the matter of decision as to acceptance of said contract containing defendants' offer was entirely for plaintiff and not for McDowell and that whatever representation said McDowell made as to the value of said land, plaintiff was nevertheless charged with the duty to form an opinion as to whether the price mentioned in defendants' offer was reasonable, plaintiff not being limited by the law to acceptance of offers representing the market value of the land but having a discretionary power enabling it to accept any price plaintiff [fol. 748] deemed reasonable, and for the further reason that said allegation is irrelevant and redundant and immaterial insofar as the said R. D. Valliant's alleged part therein is concerned for the reason that if the said R. D. Valliant, together with said R. Newton McDowell, fabricated, conceived and designed a scheme to defraud plaintiff in the manner alleged in said paragraph, said R. D. Valliant and said R. Newton McDowell being agents of plaintiff, the said defendants herein are not chargeable with responsibility for any such alleged scheme of said governmental agents R. Newton McDowell and R. D. Valliant, there being no allegation that defendants knew of said alleged scheme of said governmental agents R. Newton McDowell and R. D. Valliant to defraud plaintiff.

2. That subdivision (d) of paragraph 3 should be stricken out for the reason that representations made by said McDowell to plaintiff as to the reasonable and fair market value of the land of these defendants, or any other land in said Weldon Spring Ordnance area, are entirely immaterial and irrelevant, plaintiff having been in a position to adequately inform itself as to what constituted a reasonable price for said land in the light of the then exist-

ing circumstances and having had unlimited discretion to determine what price was reasonable.

3. That subdivision (e) of paragraph 3 should be stricken out for the reason that whether or not said McDowell procured the purported options on all the land located in said Weldon Spring Ordnance area at prices far in excess of the reasonable and fair market value thereof in pursuance of a scheme to unjustly enrich himself and by resorting to unfair and fraudulent methods in violation of his duty to the plaintiff is entirely irrelevant and immaterial to the issues in this proceeding first, because the Secretary of War had authority to accept offers which in his opinion were reasonable, and second, that plaintiff, by reason of the powers incident to sovereignty, was able for [fol. 749] itself to ascertain facts for consideration by its Secretary of War as a basis for the forming of his opinion as to whether or not defendants' offer was reasonable, and that if plaintiff's agent McDowell violated his duty to plaintiff, the failure of plaintiff to select a trustworthy agent is not the fault of these defendants, it being a presumption of law that plaintiff, the United States of America, at all times has the present means of obtaining information to enable it to determine what price it deems reasonable for it to pay for property purchased by it.

4. That subdivision (f) of paragraph 3 of said Amended Reply should be stricken out for the reason that whether or not said McDowell procured the assistance and active co-operation of other parties in representing to the plaintiff that the price named in various options was fair and reasonable is not material to the issues in this proceeding, it being a presumption of law, as aforesaid, that plaintiff, the United States of America, at all times has the present means of obtaining adequate information to enable it to determine what price it deems it reasonable for it to pay for the property purchased by it.

5. That subdivision (g) of paragraph 3 should be stricken out for the reason that whether or not said McDowell and the landowners, including these defendants, represented to plaintiff that the price or consideration named in said various purported options or in the alleged option entered into in this case was the fair and reasonable market

value of the land covered by said option agreements, or by the option agreement covering the land described in plaintiff's petition herein, is entirely irrelevant, immaterial and redundant, such alleged representations as to the fair and reasonable market value of the land being representations as to matters of opinion and not being such representations as the plaintiff was entitled to rely upon, it being the duty of plaintiff in the exercise of ordinary vigilance in the protection of its interests to inform itself as [fol. 750] to whether or not the price named in said option was reasonable in the light of the then existing circumstances.

6. That subdivision (h) of said paragraph 3 should be stricken out for the reasons hereinabove set forth in the last preceding paragraph.

7. That subdivision (i) of paragraph 3 should be stricken out for the reason that whether or not the plaintiff relied implicitly upon said McDowell and upon the representations said McDowell made to plaintiff, and whether or not plaintiff reposed in said McDowell special confidence and trust, and whether or not plaintiff believed that the representations he is allgeed to have made were true, and whether or not plaintiff believed that he, the said McDowell, was procuring on the part of plaintiff and for plaintiff said real estate at no more than the fair and reasonable market value thereof is entirely irrelevant and immaterial to the issues in this case for the reason that it is a presumption of law that plaintiff, the United States of America, at all times has the present means of obtaining adequate information to enable it to determine what price it deems reasonable for it to pay for property purchased by it, and defendants herein were not chargeable with responsibilty for plaintiff's failure to obtain such information if plaintiff did fail to obtain same.

8. That subdivision (j) of said paragraph 3 should be stricken out for the reason that whether or not plaintiff ever obtained or procured or had furnished to it or had access to any appraisement of any kind on said real estate prior to the acceptance of the option describing the land described in plaintiff's petition, and whether or not plaintiff ever procured from said McDowell any bond or assur-

ance of any sort whereby plaintiff would be safeguarded or protected against fraudulent, faithless or unlawful representations or acts of said McDowell in procuring said real estate or any part thereof is entirely irrelevant and immaterial to the issues in this proceeding first, because [fol. 751] there was no law requiring examination of any such appraisement by plaintiff, and second, because there was no law requiring plaintiff to safeguard itself against possible fraudulent, faithless or unlawful representations or acts of said McDowell in procuring said real estate, and third, because there is a presumption of law that plaintiff, the United States of America, at all times has the present means of obtaining sufficient information to enable it to determine what price it deems reasonable for it to pay for property purchased by it, and plaintiff cannot now be heard to ask that it be relieved from its contractual obligations by reason of failure on its own part to avail itself of all means at its command for ascertaining what price it was reasonable for it to pay.

9. That subdivision (k) of paragraph 3 should be stricken out for the reason that whether or not said McDowell and the defendants herein knew that the real estate described in the option herein was represented to plaintiff to be a value greater than and greatly in excess of its fair and reasonable market value, and whether or not said McDowell and said defendants knew that said real estate was of a market value of only a small fraction of the value stated in said option, and whether or not said McDowell and said defendants knew that plaintiff was relying on said representations as being true, and whether or not said McDowell and said defendants knew the plaintiff believed that said McDowell was faithfully and efficiently acquiring the property described in the petition at a price that was not more than the fair market value thereof is entirely irrelevant, immaterial and redundant, it being the duty of plaintiff, in the exercise of due diligence in the protection of its interests to inform itself as to whether or not it was reasonable in the light of the then existing circumstances to pay the consideration offered in said option, and for the reason that plaintiff had no right to rely on representations of these defendants as to value.

10. That subdivision (l) of said paragraph 3 should be stricken out for the reason that whether or not said [fol. 752] option contract was signed without any knowledge of the value of the land described except such knowledge as was based on the representations of McDowell and the landowners, if representations were made by McDowell and if representations were made by the landowners, is entirely irrelevant and immaterial to the issues in this proceeding for the reason that there is a presumption of law that plaintiff, the United States of America, has at all times adequate powers and means for obtaining sufficient information to protect itself in dealings with the individual, and plaintiff, having such powers available to it, cannot now be heard to urge as ground for relief from its contractual obligations that it was without knowledge of the value of the subject-matter with reference to which it contracted.

11. That subdivision (o) of paragraph 3 should be stricken out for the reason that as a matter of law the alleged agreement alleged therein between said R. Newton McDowell and said R. D. Valliant to include in the option price of the land described in plaintiff's petition and other land in the Weldon Spring Ordnance area the reasonable value as represented by the owner of said land, and in addition thereto the 5% commission to be received by McDowell and the 1½% fee to be received by the Kansas City Title Insurance Company, did not, as a matter of law, constitute a conspiracy between said R. D. Valliant and R. Newton McDowell; and for the further reason that even if such agreement had constituted such conspiracy, the existence of such alleged conspiracy between the two said agents of the plaintiff was no fault of the defendant landowners, and said defendant landowners are not chargeable with the responsibility therefor or with knowledge thereof.

12. That subdivision (p) of paragraph 3 should be stricken out for the reason that it is based on an erroneous concept of the law in this, that the fair and reasonable price of land, as a matter of fact, includes both the net amount of money to be received by the vendor and the amount that said vendor must pay to cover the expense of conveyancing and to compensate the party or parties [fol. 753] negotiating the sale, and the addition of the ex-

penses of sale to the net amount which vendor is to receive for his land is entirely proper and legitimate; and that any agreement between R. Newton McDowell and R. D. Valliant, if such agreement was made, for the addition of the expenses of said sale to the net amount of money that the vendor expected to receive was a proper and legitimate agreement and did not constitute any conspiracy against plaintiff herein.

13. That subdivisions (q), (r) and (s) of said paragraph 3 should be stricken out for the reasons set forth in the last preceding hereinabove paragraph.

14. That paragraph 5 should be stricken out, first, for the reason that the Act of July 2, 1940, being 54 Stat. 712, does not apply to the contract between these defendants and the United States of America, the contract in issue in this proceeding, said Statute applying only to contracts relating to construction, and the prohibition against cost-plus-a-percentage-of-cost contracts in said Statue being meant to prohibit only contracts whereby the Government of the United States of America contracts to pay a contractor on the basis of cost-of-production-or-construction-plus-a-percentage-of-the-cost, and not being meant to prohibit the Government of the United States from entering into a contract in which the other contracting party agrees to pay a third party a commission; and, second, for the reason that if McDowell and the defendants did cause to be included in the option price, which allegation defendants do not admit, the said 5% commission to McDowell and the said 1½% fee to the Kansas City Title Insurance Company, this fact does not, as a matter of law, bring the contract between these defendants and the United States of America, which is in issue in this proceeding, under the operation of or within the meaning of the aforesaid Act, being 54 Stat. 712, the term "cost" in the phrase "cost-[fol. 754] plus-a-percentage-of-cost" being limited to cost of production or construction, and not being descriptive of a price of land offered by the defendant landowners and accepted by the plaintiff Government; and, third, for the reason that if any public policy has been expressed or established by the Act of June 28, 1940, 54 Stat. 676, and the Act of July 2, 1940, 54 Stat. 712, with reference to cost-plus-a-percentage-of-cost contracts, the prohibitions of

such public policy are not directed against any contracts other than contracts based on the cost-of-production-or-construction-plus-a-percentage-of-cost, and are not directed against contracts of sale between a property owner and the Government of the United States which contracts provide for a commission to be paid by the property owner to a third party; and, fourth, for the reason that if any public policy has been established or expressed by either the Act of May 2, 1941, 55 Stat. 148 (the establishment of which defendants do not admit), or the Act of December 18, 1941, known as The First War Powers Act, 1941 (the establishment of which defendants do not admit), or by both of them taken together (the establishment of which defendants do not admit), or by both of them taken together with the Act of June 28, 1940, 54 Stat. 676, and the Act of July 2, 1940, 54 Stat. 712, (the establishment of which defendants do not admit), that public policy so established and expressed can have no possible application to the contract in issue here because said Act of May 2, 1941 and said Act of December 18, 1941 were both enacted into law subsequent to the 27th day of November, 1940, the date upon which these defendants and this plaintiff entered into the contract in issue in this proceeding, and any public policy based upon said Acts or based in part upon said Acts can have no application to the contract in this proceeding for the reason that such public policy was established, if established, subsequent to the entrance into this contract; and, fifth, for the reason that said Act of [fol. 755] July 2, 1940, being 54 Stat. 712, has no application to the purchase of land by the War Department for military purposes except insofar as such purchase is the purchase of land to be added to the land of a privately owned but Government operated plant, being operated by the Government for military purposes; and, sixth, for the reason that at the time the contract of these defendants was accepted by plaintiff, the price of the land was stated in the contract at $12,000.00, and said price being definitely fixed and ascertained at the time of the entrance into the contract, any percentage thereof amounted to a fixed sum.

15. That sub-paragraph (4) of paragraph 6 should be stricken out because it erroneously states the law as em-

bodied in Title 50, U. S. C., Section 171, in this that it says that said Title 50, U. S. C., Section 171 authorizes purchase without condemnation only when the sum purported to be agreed upon is the reasonable value of the land, whereas, as a matter of fact, the language of such statute with reference to purchase without condemnation is as follows:

"When the owner of such land, interest or rights pertaining thereto shall fix a price for same which, in the opinion of the Secretary of War, shall be reasonable, he may purchase or enter into a contract for the use of same at such price without further delay."

there being nothing said in said Section about the reasonable value of the land, the words used in said Section being the "price which in the opinion of the Secretary of War shall be reasonable", and said sub-paragraph should be stricken out for the further reason that the reasonable cash market value of said land is not the issue in this proceeding.

[fol. 756] 16. That subdivision (b) of sub-paragraph (5) of paragraph 6 should be stricken out for the reason that the allegation that the commission provision constitutes a contingent brokerage contract which would have a tendency first, to cause R. Newton McDowell to recommend an inflated, excessive and exorbitant valuation, and second, would have a tendency to cause R. Newton McDowell to use oppressive, improper and corrupt methods to procure said options in order that he might obtain his contingent brokerage commission is contrary to the existing presumption of law that every man is honest.

17. That subdivision (e) of sub-paragraph (5) of paragraph 6 should be stricken out for the reason that even if (as defendants do not admit) the value of said land was only $2820.00, whereas the contract price was $12,000.00, nevertheless, said sum of $12,000.00 was not unconscionable under the law because, by reason of plaintiff's sovereignty and great power and strength, it could not have labored under any disability when it entered into said contract.

18. That subdivision (a) of sub-paragraph (6) of paragraph 6 should be stricken out for the reason that the allegation therein contained that said option is invalid,

void and unenforceable because so improvident and so unfair to the Government that it ought not in equity and in good conscience to be called upon to perform thereunder in that the alleged offer in said option is $12,000.00, whereas the alleged cash market value of said property was $2820.-00, is not a correct allegation as to the law, there being no allegation that plaintiff labored under any disability, recognized as such by the law, when it entered into such contract.

19. That subdivision (b) of sub-paragraph (6) of paragraph 6 should be stricken out for the reason that the allegation that the alleged contract is invalid and void and unenforceable because it was so improvident and so un- [fol. 757] unfair to the Government that it ought not in equity and in good conscience to be called on to perform thereunder in this that the amount contained in said option included as elements of value certain elements which were improper elements, such as disturbance factors, expense of removal, replacement value, allowances to tenants, damages for growing crops, is contrary to the law as set forth in Title 50, Section 171, U. S. C. A., under the provisions of which said contract was negotiated, in this that the portion of said Section which gives to the Secretary of War the right to purchase land at a price which in his opinion is reasonable is broad enough to permit the Secretary, or any person designated by law to act for him, to consider, in approving the price, such elements as disturbance factors, expenses of removal, replacement value, allowances to tenants and damages for growing crops.

20. That subdivision (a) of sub-paragraph (7) of paragraph 6 should be stricken out for the reason that the allegation therein contained to the effect that said option is invalid, void and unenforceable because the contract is constructively fraudulent because of the alleged fact that McDowell, R. D. Valliant and the defendants represented to the Secretary of War and his duly accredited representatives acting for and in behalf of plaintiff that the figure submitted in said option offer was the actual reasonable cash market value of the land when, according to said allegation, in truth and in fact, McDowell, Valliant and defendants all knew that said figure contained certain elements and factors which did not constitute the actual cash

market value, namely, disturbance factors, expenses of removal, replacement value, allowances to tenants, damages for growing crops, does not state facts showing either fraud or constructive fraud for the reason that there is a presumption of law to the effect that plaintiff, the United States of America, at all times has the present means of obtaining sufficient information to enable it to ascertain what price it deems reasonable for it to pay for property [fol. 758] purchased by it, and for the reason that in view of this presumption of law plaintiff was equipped to protect itself in dealings with an individual and to ascertain for itself whether or not such alleged representations were true or false, and plaintiff cannot now be heard to say that it was a victim of either actual or constructive fraud in the course of the negotiation of said contract, and for the reason that plaintiff, in determining the price to be reasonable, was not limited to the cash market value.

21. That subdivision (b) of sub-paragraph (7) of paragraph 6 should be stricken out for the same reasons hereinbefore alleged in the hereinabove paragraph numbered 20.

22. That subdivision (c) of sub-paragraph (7) of paragraph 6 should be stricken out for the same reasons hereinbefore stated in the hereinabove paragraph numbered 20.

23. That subdivision (d) of sub-paragraph (7) of paragraph 6 should be stricken out for the reason that the provision of the contract in issue which provided for 5% commission to R. Newton McDowell, and the provision of said contract which provided that the defendants should furnish a certificate of title prepared by the Kansas City Title Insurance Company, constituted adequate notice to the United States of America, plaintiff herein, to enable it to know that landowners making offers on option form containing such provisions would take into consideration the fact that they were contracting to pay McDowell a 5% commission out of the money they were to receive from the Government for their land, and that they were contracting to pay to the Kansas City Title Insurance Company a reasonable fee for furnishing said certificate of title, in fixing their price under the provisions of Title 50,

Section 171, U. S. C., providing that the land could be purchased at a price fixed by the landowner which should be reasonable in the opinion of the Secretary of War; and for the further reason that by reason of the fact that said contract provided for a commission on the gross sale price, plaintiff was charged with knowledge that a commission [fol. 759] would be charged on said gross sale price notwithstanding the possibility that said price had been fixed by the landowner at a higher figure because of defendants' taking into consideration the fact of the commission, and that plaintiff being charged with such knowledge on the face of the contract, the collection of said commission constituted no secret profit, and the consideration of the commission in arriving at the price constituted no secret understanding and no violation of the alleged option agreement.

24. That subdivision (f) of sub-paragraph (7) of paragraph 6 should be stricken out for the reason that whether or not R. Newton McDowell was true to his trust, or was known by these defendants to be true to his trust, is entirely immaterial to the issues in this proceeding because of the existing presumption of law to the effect that the Government of the United States is equipped with adequate powers to enable it to ascertain such facts as shall make it possible to protect itself in dealings with an individual, and cannot be heard to urge, as a reason for being relieved from its contractual obligations, that it was misled by its own agent or by reason of said defendants' alleged misrepresentations as to the value of the subject-matter of the contract with reference to which the contract was entered into; and for the further reason that whether or not R. Newton McDowell stirred up litigation against this plaintiff and recommended employment of attorneys and failed to attempt to renegotiate contracts and permitted personal considerations to enter into prices submitted by him to the War Department, is entirely irrelevant and immaterial to the issues involved in this proceeding because of the presumption of law hereinbefore referred to in this paragraph and the logical consequences of said presumption.

25. That subdivision (g) of sub-paragraph (7) of paragraph 6 should be stricken out for the reason that, as a matter of law, no matter how great the disparity between

the actual cash market value of the land involved in this proceeding and the contract price, neither contracting party is entitled to be relieved from the terms and pro- [fol. 760] visions of the contract unless it be alleged and proven, as it is not alleged in said subdivision (g) of sub-paragraph (7) of paragraph 6, that one of the contracting parties was laboring under some disability at the time of entrance into said contract.

26. That sub-paragraph (8) of paragraph 6 should be stricken out for the reason that whether or not said contract was entered into as a result of an unilateral mistake of fact by reason of plaintiff's lack of knowledge of the cash market value of the property, and by reason of plaintiff's mistaken belief that the property was worth the amount of money named in said contract, and whether or not defendants knew that said property was worth a much smaller amount than the amount of said contract is immaterial to the issues in this proceeding for the reason that there is a presumption of law to the effect that the Government of the United States is armed with both an actual and potential arsenal of powers adequate to protect itself in dealings with the individual, and that it had facilities whereby it could inform itself as to the true facts as to what price it should believe to be reasonable for the land in the light of the existing circumstances and, therefore, cannot now be heard to say that it should be relieved from the terms and provisions of said contract.

27. That sub-paragraph (9) of paragraph 6 should be stricken out for the reason that however great the disparity between the actual cash market value of the land and the contract price, such disparity does not constitute a material issue in this proceeding, first because the cash market value of the land is not at issue, the Secretary of War being authorized by the Act under which this contract was consummated to purchase the land at a price fixed by the landowner reasonable in the opinion of the Secretary, and second, for the reason that mere disparity, however great, in the absence of an allegation of misrepresentation of a material fact or an allegation that the party seeking to be relieved from the performance of the contract on that ground was laboring under disability, recognized by [fol. 761] the law at the time of the negotiation of the

contract, is not legal ground for holding a contract invalid and void.

28. That sub-paragraph (12) of paragraph 6 should be stricken out for the reason that if the title of William M. Andrews and Bertha L. Andrews, his wife, is subject to any rights of the persons enumerated in said sub-paragraph as having an interest in the land, which rights or interests cannot be removed by payment from the contract price, this fact does not go to the validity of said contract, but rather brings into operation that provision of the contract which provides for condemnation for clarification of title and provides that the contract price shall be awarded in the condemnation proceeding.

29. That sub-paragraph (13) of paragraph 6 should be stricken out for the reason that the allegation therein contained to the effect that defendants' Answer sets up a counterclaim against the United States Government is based upon a misconception of law, said misconception being that the defendants are asking for a judgment on the contract in this proceeding for the sum of $12,000.00 when, as a matter of fact, defendants' prayer in their Answer is that the judgment in condemnation prayed for by plaintiff shall fix the compensation at $12,000.00, the price agreed upon in the aforesaid contract, rather than at a price found by commissioners as prayed by plaintiff; and for the further reason that the allegation in said sub-paragraph to the effect that defendants seek in this proceeding to recover a sum in excess of $10,000.00, alleged to be beyond the jurisdiction of this Court, is based on a misconception of law in this that defendants are merely asking that the condemnation judgment prayed for by plaintiff shall fix said compensation at the sum of $12,000.00 rather than at a sum to be found by commissioners.

30. That sub-paragraph (4) of paragraph 6, subdivision (e) of sub-paragraph (5) of paragraph 6, subdivision (a) of sub-paragraph (6) of paragraph 6, subdivision (b) of sub-paragraph (7) of paragraph 6, subdivision (g) of sub-[fol. 762] paragraph (7) of paragraph 6, sub-paragraph (8) of paragraph 6, and sub-paragraph (9) of paragraph 6 should be stricken out for the reasons heretofore set forth and for the additional reason that the allegations

that $2820.00 represented the amount of the cash market value of the land described in this proceeding are wholly inconsistent with an admission against interest heretofore made in this proceeding, and being a part of the record herein, said admission against interest being the allegation made by the Hon. Henry L. Stimson in the Declaration of Taking, heretofore filed herein on the date of the filing of the petition herein, to the effect that:

"And I, Henry L. Stimson, Secretary of War, acting in the capacity aforesaid, hereby state that the sum of money ascertained by me as just compensation for the land is set forth in Schedule "A" annexed hereto and made a part of this declaration."

and said Schedule "A" so annexed to said Declaration of Taking being as follows insofar as said estimated value is concerned:

"Total area: 94.46 acres. Estimated value: $3460.00.

• • • • • • • • •

The total estimated value of the entire area is $3460.00, which is the gross sum of money ascertained by the acquiring authority to be just compensation for the aforesaid land in this proceeding and hereby taken."

said Declaration of Taking having been duly signed by Henry L. Stimson, Secretary of War of the United States, the plaintiff Government herein.

31. The prayer of plaintiff's Amended Reply herein should be stricken out for the reason that said prayer asks for the concellation and setting aside of a contract, which prayer is for an equitable remedy, whereas condemnation is a common law proceeding, and defendants have stayed on the common law side of the Court with plaintiff, and plaintiff is not entitled, in its Amended Reply, to pray for equitable relief.

32. That plaintiff's whole Amended Reply should be stricken out for the reason that, as a matter of adjective [fol. 763] law, first, said Amended Reply or Replication is an improper pleading in that no equitable relief is prayed in said defendants' Amended Answer, and that plaintiff having instituted a common law proceeding and these defendants, in their Amended Answer, having stayed with

plaintiff on the common law side of the Court, any further pleading by plaintiff is an unwarranted and improper pleading; and, second, for the reason that said Amended Reply, and the filing thereof, was wholly improper because belated and untimely, having been filed by leave of Court at a late stage of the proceeding, being at the beginning of the trial of this cause, objection to the filing of same having been duly made by counsel for defendants and leave to file the same having been granted subject to said objection so made, and having been granted by the Court only on the ground of plaintiff's surprise at the nature of the testimony of the witness R. D. Valliant, there having been no testimony or evidence introduced by plaintiff as to the nature of said surprise which plaintiff urged as ground for the granting of leave for the filing of said Amended Reply at the time of the granting of said leave or at any time thereafter, the only statement as to said surprise being a statement made ~~by~~ counsel for plaintiff in his capacity as advocate at the bar rather than in a capacity as a witness in the cause, said statement being insufficient to prove the claim of surprise both because said statement was too general in nature to establish said claim, not specifying of what said surprise consisted, and because said statement of counsel was not made under oath and as a witness in this proceeding; and said Amended Reply having been untimely, as above alleged, should be stricken out in its entirety.

(s) SAMUEL M. WATSON,
Attorney for defendants William M. and Bertha L. Andrews.

[fol. 764] United States of America, Plaintiff,
Docket No. 874 vs. At Law
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al, Defendants.

Defendant's Motion to Strike Plaintiff's Testimony Introduced for the Purpose of Showing Fraud, Conspiracy, and Value of Land.

(Filed April 18, 1942.)

Come now the defendants William M. Andrews and Bertha L. Andrews, by their attorney, after first having

obtained leave of Court to file a written motion to strike out certain testimony, and move the Court to strike from the record the testimony of certain witnesses as follows:

1. To strike out the testimony of Senator George H. Williams introduced for the purpose of proving the charge of fraud on the part of the defendants, alleged in plaintiff's Amended Reply, for the reason that said testimony fails to develop any fact that shows any act of fraud committed on the part of the defendants with reference to the sale of the real estate involved herein to plaintiff.

2. To strike out the testimony of Senator George H. Williams introduced for the purpose of showing the conspiracy alleged in plaintiff's Amended Reply between the defendants and R. Newton McDowell and R. D. Valliant to defraud the United States Government in the sale of the said real estate by the defendants to the United States Government for the reason that said testimony fails to show any conspiracy on the part of either R. Newton McDowell, Col. R. D. Valliant or these defendants, or any collaboration one with the other in the nature of a con-[fol. 765] spiracy, or that they in any manner engaged in any act amounting to the conspiracy alleged in plaintiff's Amended Reply or from which such conspiracy can be in any way inferred.

3. To strike out the testimony of plaintiff's witnesses William Kaut, Thomas H. Rogers, Mr. Sinock, Louis E. Wackher, Theodore Seib, Mr. Albrecht, Darby Talley, Mr. Wiseman, Adolph A. Daniel, Fred Thompson, Joe Wentker, Frank Edwards, Leo T. Briece, Mr. King, Miss M. F. Bratten, Birch O. Mahaffey, Robert H. Fabien, and Herbert Meyer introduced for the purpose of showing the alleged fraud and conspiracy alleged in plaintiff's Amended Reply and referred to in the hereinabove paragraphs numbered 1 and 2 for the same reasons set forth in said hereinabove paragraphs for the striking out of the testimony referred to in said paragraphs.

Defendant further moves to strike out the testimony of Dan Thompson, John F. Briscoe, Charles Cardwell, Forest Hughes, Roscoe Murphy, Scott Meyer, G. R. Thursby and Charles Harvey introduced by plaintiff for the purpose of

showing the value of the property for the reason that there having been no evidence that plaintiff labored under any disability at the time of entrance into the contract in issue herein and no evidence of any suspicious circumstance in connection with said contract, plaintiff was not entitled to introduce any testimony as to the value of the property, the price of said property having been deliberately agreed upon between the plaintiff and the defendant.

Attorney for defendants William M. Andrews and Bertha L. Andrews.

[fol. 766] United States of America, Plaintiff,
Docket No. 874. vs.
Certain Land, Situate in the County of St. Charles, State of Missouri, and William M. Andrews, Defendant.

Defendant's Motion to Require the United States District Attorney For the Eastern District of Missouri of the Eastern Division to Exhibit to Attorneys For Defendant Certain Matters in Writing for the Purpose of Inspection by the Attorneys For the Defendant, and For Permission For the Attorneys For the Defendant to Make Copies of Said Instruments in Writing For the Use of the Defendant in the Preparation of the Trial of the Above Entitled Cause.

(Filed December 12, 1941.)

Now comes the above named defendant by its attorneys of record, Oliver T. Johnson & Samuel M. Watson, and moves the Court to require the United States District Attorney for this District to furnish to the atorneys for the defendant the original, and if he has not the original, the copies of same which are in his possession, custody or control, the following instruments in writing, records, orders, letters, contracts, agreements, and evidences of authorization in all matters connected with the selection and designation of the tract of ground near Weldon Springs in St. Charles County, Missouri, for the location of a governmental project for the maufacture and storage of explosives and explosive material, by the President of the United

States, the Secretary of the War Department, or any subordinate officer of either the President of the United States or the Secretary of the War Department, and in this connection the defendant states to the Court that it verily believes that there is in the custody of the United States [fol. 767] District Attorney at St. Louis, either the original or the copy of the following instruments, hereinbefore specifically classified and hereinafter set forth, and permit said attorneys to make copies thereof.

(1) A directive issued by the Adjutant General of the United States Army addressed to the Under Secretary of War, containing a recitation to the effect and substance that it is issued by order of the Secretary of War, said directive stating that a military necessity existed for the acquisition of the land involved in the Weldon Springs Ordnance Project to which document when it reached the hands of the Under Secretary of War was affixed a document issued by the Under Secretary of War, transmitting the directive aforesaid to the Quartermaster General of the United States Army and directing that the land designated for said Weldon Springs Ordnance Project be procured.

(2) The instrument or instruments of transfer whereby the funds appropriated for the acquisition of the land designated for said project were transferred by the Chief of Ordnance of the United States Army to the Quartermaster General of said Army.

(3) A certain document being an office order of the Quartermaster General of the United States Army, same being Office Order No. 6 of February 17th, 1937, said document relating to the duties of R. D. Valliant, Colonel Q.M.C., United States Army, in land acquisition matters under the Quartermaster General, said document being signed by C. R. Bennett, Colonel, Q.M.C.

(4) That office order of the Quartermaster General of the United States Army providing for issuance of office orders of the Quartermaster General over the signature of C. R. Bennett, Colonel Q.M.C. and authorizing said C. R. Bennett to issue office orders of the Quartermaster General.

(5) The contract or instrument of writing purporting to be a contract between the United States of America and [fol. 768] R. Newton McDowell, said instrument being over the signature of R. D. Valliant, Colonel Q.M.C., having to do with the acquisition of the property in the Weldon Springs Ordnance site area.

The defendant states that the foregoing instruments and matters set forth are necessary as evidence to sustain the allegations in the defendant's answer to plaintiff's petition, and that the evidence is not in the possession of the defendant but is in the possession and control of the plaintiff, its officers, agents and servants, and is especially in the possession, custody and control of the United States District Attorney, and if any of the same that would be admissible as evidence is not in the direct possession of the said United States District Attorney, that the Court require the said United States District Attorney to obtain the originals from wherever they may be and have them lodged in his possession for the purposes above set forth in this motion.

(s) SAMUEL M. WATSON,
(s) OLIVER T. JOHNSON,
Attorneys For Defendant.

[fol. 769] United States of America, Plaintiff,
Docket No. 874. vs. At Law.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

(Motion of Defendants to Require Counsel for Plaintiff to Procure and Furnish Originals of Certain Records, Orders, Letters, etc.)

(Filed February 27, 1942.)

Come now the above named defendants, William M. Andrews and Bertha L. Andrews, by their undersigned attorney of record, and move the Court to require Harry Blanton, U. S. District Attorney for the Eastern Judicial District of Missouri, an agent, servant and employee of the United States of America, and counsel for the United States of America in the within proceeding, to procure and furnish to the attorney for these defendants the original

of the following instruments in writing, records, orders, letters and evidences of authorization and of approval in matters connected with the selection and designation and purchase of the tract of ground near Weldon Spring in St. Charles County, Missouri, for the location of a governmental project for the manufacture and storage of explosives and explosive materials by authority of the President of the United States or Secretary of War or any other subordinate officer of either the President of the United States or the Secretary of War, and in this connection these defendants state to the Court that they verily believe that there is in the office of the Assistant Secretary of War (or Under Secretary of War) in the War Department, Washington, D. C., an instrument whereby Hon. Franklin D. Roosevelt, [fol. 770] President of the United States, approved the ordnance project known as the Weldon Spring Ordnance Project for construction of a TNT and DNT plant, and they verily believe that there are records in the office of L. H. Campbell, Jr., Brigadier-General, Ordnance Department, Assistant Chief of Industrial Service Facilities, showing that on October 18, 1940, Franklin D. Roosevelt, President of the United States, approved the site of said project and approved said project. These defendants state that the foregoing instruments and matters set forth are evidence to sustain the allegations in the defendants' Answer to plaintiff's petition and that the evidence is not in the possession of the defendants but is in the possession and control of the plaintiff, its officers, agents and servants, and is especially in the control or possession of or available to the aforesaid Harry Blanton.

Wherefore, defendants pray that this Court require plaintiff, through its agent, servant, employee and attorney Harry Blanton, as aforesaid, to produce in this Court and make available to counsel for defendants herein for inspection and for introduction as evidence in the trial of this proceeding.

First, the aforesaid written instrument hereinabove alleged to be in the office of the Assistant Secretary of War whereby the President of the United States approved the Weldon Spring Ordnance Project or the instrument whereby the President so approved said project wherever said

instrument may be found, or an authenticated copy thereof, And,

Second, the original record, or an authenticated copy of said record, of the Office of the Chief of Industrial Service Facilities of the Ordnance Department showing the approval of the Weldon Spring Ordnance Project and site by the President of the United States on October 18, 1940. And,

[fol. 771] Third, any other written evidence or record of approval of said project by the President of the United States known to the plaintiff, or an authenticated copy thereof.

And defendants pray that, for the purposes aforesaid, such documents be impounded by the Court during the pendency and trial of this action.

(S) SAMUEL M. WATSON,
Attorney for defendants William M. Andrews and Bertha L. Andrews.

[fol. 772] United States of America, Plaintiff,
No. 874. vs.
Certain Land Situate in St. Charles County, State of Missouri, known as Tract No. 19, and William M. Andrews, et al., Defendants.

Transcript of Testimony and Proceedings:

(Filed March 4, 1943.)

Be It Remembered, that on the 3rd day of April, 1942, at 10 A. M., this matter coming on for hearing in the United States District Court, in the above District and Division, in New Federal Building, St. Louis, Missouri, before Hon. George H. Moore, Judge, the following proceedings were had:

Appearances:

For U. S. Government, Harry C. Blanton, Esq., Drake Watson, Esq.

For the Defendants, Samuel M. Watson, Esq., Redick O'Bryan, Esq.

[fol. 773] (Plaintiff's Counsel filed an amended reply.)

Mr. S. Watson: We object to the granting of leave to file that. We desire to renew our objection.

The Court: There would be no question, he would have a right to file it. He filed it in the case tried earlier, and he can file it in the other cases where he has not filed it.

Mr. O'Bryan: The Court is accepting the same objections as in the other case, and same rulings?

Mr. Blanton: We have no objection to that being understood, Mr. O'Bryan.

The Court: I thought that was understood.

Mr. O'Bryan: It is being accepted according to the rulings yesterday?

The Court: Yes, sir; that is my understanding.

(Two papers are marked "Government's Exhibit 1," and "Government's Exhibit 2," respectively.)

Mr. Blanton: I think probably in order to make the record in this court-room, the record ought to show, by agreement, the record in Case 765, which was tried before the three Judges, where pertinent to this case, together with all objections and exceptions, and offers and rejections, and the exceptions thereto offered by either party are entered in the record in this case to be supplemented by such additional testimony as may be offered by either party in this particular case.

[fol. 774] Mr. S. Watson: I believe that states the agreement as it should be.

The Court: How broad did you state it?

Mr. Blanton: All the record made in the case yesterday, including objections made to testimony offered, and the rulings of the Court.

The Court: Everything except the testimony as to valuation; you don't want that?

Mr. Blanton: No, sir; valuation as to that particular tract I do not think is pertinent or competent, and it could

be supplemented by whatever either side wants to offer in this case.

The Court: You said all of it.

Mr. Blanton: No, sir; I did not intend to include that.

Mr. S. Watson: By that, you mean whatever either side wants to introduce in this case, that is made necessary by the peculiarities of this case, as distinguished from the other?

Mr. Blanton: That is correct, Mr. Watson.

Mr. Watson: I think that states the basis of the agreement, Your Honor.

The Court: I understand there is no limitation on what may be introduced in this case, except everything that has been introduced in the other case is, by stipulation, here?

Mr. Blanton: That is correct.

Mr. Watson: Subject to all objections.

The Court: And any other testimony is competent?

[fol. 775] Mr. Blanton: That is my understanding of it, Your Honor.

(Evidence for Plaintiff)

Thereupon, the Government, to sustain the issues on its behalf, offered and presented the following evidence:

Mr. Blanton: Now, Your Honor, in order to make the formal record, I would like to offer in evidence Government's Exhibit 1, which is formal request of the Secretary of War to the Attorney-General for the condemnation of the piece of property involved in this case, dated April 10, 1941; and, in accordance with Mr. Sam Watson's suggestion, I will further state that the first paragraph of this exhibit reads:

"Dear Mr. Attorney-General:

"It is necessary and advantageous to the interest of the United States that certain land and appurtenances located

and situated in St. Charles County, Missouri, be acquired by the United States of America for use in connection with the Weldon Springs Ordnance plant—"

Mr. S. Watson: If the Court please, object to the admission of the document in evidence on the ground that the statement therein, that it is necessary to acquire this land, is an erroneous statement of fact, in view of the fact that the land had already been acquired by purchase or by contract.

The Court: Any other objection?

Mr. S. Watson: No other objection. I am making that as an objection.

[fol. 776] The Court: Objection is overruled.

Mr. Watson: If the Court please, at this time may we have the same agreement in this case that we had in the other case relative to exceptions? Will it be taken?

Mr. Blanton: Perfectly agreeable with me; without your saving exceptions, it may be understood whenever an objection is overruled you do save exception to the ruling; and that applies to both parties. Is that agreeable?

Mr. Watson: That applies to both parties; yes, sir.

[fol. 777] Summary of Government Exhibit 1.

This exhibit is a certified copy of the request of the Secretary of War to the Attorney General, dated April 10, 1941, requesting the condemnation of lands described in the declaration of taking, accompanying said letter, including among other lands the lands involved in this suit.

[fol. 778] Mr. Blanton: I now would like to offer Government's Exhibit 2, which is an instruction from the Attorney-General to myself, dated April 12, 1941, instructing us to file a condemnation suit against this particular piece of property. And that letter includes Government's Exhibit No. 1, which has been offered, and the original Declaration of Taking, and a check to cover this and several other parcels of land which are not involved in this

particular case, which is in the registry of the Court, along with the Declaration of Taking.

Mr. S. Watson: Object to the acceptance of this document in evidence on the ground that it also includes allegations of necessity which are wrong as a matter of law, in view of the fact of the existence of the contracts of purchase.

The Court: It will be admitted subject to the objection.

[fol. 779] Summary of Government Exhibit 2.

This exhibit is a letter from the Attorney General to the United States Attorney, enclosing the request of the Secretary of War, dated April 10, 1941, (Government exhibit 1), the declaration of taking referred to therein, a check for deposit in the registry of the court, and directing the filing of the petition in condemnation involving the lands condemned in this suit, and other lands.

[fol. 780] (Offer of Order Authorizing Filing of Petition in Condemnation, Declaration of Taking and Order Vesting Title, etc.)

Mr. Blanton: Now, Your Honor, we would like to offer the order of Court authorizing the filing of this petition, the Declaration of Taking which was filed in the Court and is part of the original files in this case; the judgment of the Court vesting title in the Government based upon that Declaration of Taking, and all records, filings, minutes, orders and judgments entered and filed in this case, without offering them document by document.

Mr. S. Watson: No objection.

The Court: Very well, you may do so.

These documents are not set forth herein for the reason that those pertinent to the decision of the case are set forth in other portions of the record.

[fol. 781] (Testimony for Defendants.)

Whereupon, the defendants, to sustain the issues in their behalf, offered and presented the following evidence:

William M. Andrews of lawful age, produced, sworn and examined, testified on behalf of defendants as follows:

Direct Examination.

By Mr. S. Watson:

Q. State your full name.

A. William Andrews.

Q. Where do you live, Mr. Andrews?

A. 5019 Geraldine Avenue, St. Louis.

Q. Were you formerly the owner of a tract of land in St. Charles County within the TNT site area?

A. I was.

Q. About what amount of acreage was comprised in that tract? A. Ninety-six, more or less.

Q. I will show you a description of the land in a document here, which will later be offered in evidence. I will ask to mark this document "Defendants' Exhibit 1". (The paper is marked as requested)

Q. And I will ask you if that is a description of the land owned by you in that area?

A. It is; yes, sir.

Q. Were you approached with a view to the sale of that land to the United States of America?

[fol. 782] A. Yes, sir.

Q. When were you so approached?

A. About the 15th of November, 1940.

Q. What was the first that you heard, Mr. Andrews, about the purchase or proposed acquisition of this land by the United States Government?

A. Sometime in the early or middle part of November.

Q. How did you hear about that?

A. We heard through the papers and through talking in the neighborhood, that there was a TNT plant to be located in our neighborhood there.

Q. What happened next in that connection?

A. Well, in relation to my tract of land, I didn't think it was going to come towards my place at all; I didn't have any idea it would come that far.

Q. I mean, Mr. Andrews, what happened next with reference to negotiations with you?

A. Oh, some week or ten days later some gentleman called up and asked if he could have an appointment to negotiate the sale of my land to the Government for a

TNT site, and we made the appointment, and he came to the house.

Q. Do you know who he was? A. Mr. Williams.

Q. Mr. Williams? A. Yes, sir.

Q. Whom did he say he represented?

[fol. 783] [Q. Whom did he say he represented?]

A. He represented the War Department.

Q. Well, did he say anything about being connected with Mr. McDowell's organization?

A. Worked for Mr. McDowell, yes, sir.

Q. He said he worked for Mr. McDowell?

A. Yes, sir.

Q. Now, what transpired in that ensuing conversation?

Mr. Blanton: Of course, Your Honor, I don't want to keep this out, but I want to make the formal objection that I think the option speaks for itself as to what was finally consummated. I do not know just what Mr. Watson intends to ask him. The negotiations leading up to the contract, of course, would not be the best evidence.

Mr. Watson: I just want to get the facts before the Court.

Mr. Blanton: All right; go ahead.

Q. Proceed.

A. Mr. Williams asked us to set a figure for the sale of the farm, which of course, we didn't want to sell.

Q. You speak of "we."

A. My wife and I.

Q. Did you and your wife own that land jointly as husband and wife? A. We did.

Q. But you did own it at that time?

[fol. 784] A. Yes, sir.

Q. By that nature of ownership? A. Yes, sir.

Q. Now, proceed.

A. Mr. Williams came out to the house to discuss the sale of the property, and we set a figure.

Q. What figure did you set?

A. $150 an acre. Mr. Williams told us he thought the figure was rather high, and we told him we didn't want to sell the property, and we thought it was worth that to us to replace it, that a place of equal value would cost us $150 an acre, that near town. We signed an option of

$150 an acre, and Mr. Williams said he would submit it, which he did. Some day or so later, I do not remember the exact time that transpired, he called us up and told us that contract could not and would not be approved, and asked us for another appointment to discuss the matter further. We gave him another appointment, and he came out to the house some time later, and we discussed it at length. My wife and I, of course, had discussed it together, and we set another figure at $125 an acre, which we signed an option on it at that figure and sent it into Mr. McDowell, and it went through the War Department.

Q. Now, you gave that to Mr. Williams, then?

A. Yes, sir.

Q. And later on—did you sign that document in triplicate?

[fol. 785] A. Yes, sir.

Q. Later on, did one of the copies come back to you through the mail? A. Yes, sir.

Q. And by whom was that transmitted? Was a letter of transmittal with it, sending it to you?

A. I don't remember; I suppose there was; I don't remember. The document came back, though.

Q. And did it have anything on it, that it didn't have before?

A. Yes, sir; it had "accepted and approved," I believe, "by the War Department." I don't know just exactly what was on there; anyhow, it was accepted and approved.

Mr. Blanton: We think the document shows on its face what it is for and ask that "approved by the War Department" be stricken because it shows it was by Col. Valliant.

The Court: Sustained.

Q. Did you have a tenant on that farm?

A. The land was rented out; yes, sir.

Q. To whom was it rented?

A. Schulte Brothers.

Q. Did you make an agreement with Schulte Brothers to release possession of this property? A. Yes, sir.

Q. Upon the approval of this option?

[fol. 786] A. Yes, sir.

The Court: What was that?

Mr. Watson: I asked him if he made an agreement with Schulte Brothers to release possession of this property and vacate it upon the acceptance of the option by the Government.

The Court: It was under lease, was it?

Mr. Watson: It was not under lease—an ordinary tenancy from year to year.

Q. I will show you this signature. Is that your signature? A. Yes, sir.

Q. I also show you this signature. Did you see your wife sign that?

A. Yes, sir; Bertha L. Andrews.

Q. Is that her signature? A. Yes, sir.

Q. Now, when you made that agreement with the Schulte Brothers—First, I will ask this be marked "Defendant's Exhibit 2." (The paper is marked as requested)

Q. When you made that agreement with Schulte Brothers, was that the agreement you entered into?

A. Yes, sir, it was.

Q. Were you present when Mr. Schulte signed that?

A. Yes, sir.

Q. You saw him sign that? A. Yes, sir.

[fol. 787] Q. That is his signature? A. Yes, sir.

Mr. Blanton: What is the date of that?

A. Mr. Andrews, do you know when this document was signed?

A. In the latter part of November.

The Court: Is that the release? Is that the Schulte release?

Mr. Watson: That is the Schulte release, Your Honor.

Q. Well, you say it was signed in the latter part of November?

A. Yes, sir, the latter part of November; I don't remember the date. Things were breaking too fast then.

Q. Now, Mr. Andrews, what happened next in connection with this transaction? Did you go to the Kansas City Title Company?

A. Yes, sir; I received notice to take my deed and abstract to Emmons, I believe, in St. Charles, which I did.

Mr. Blanton: Emmons Abstract Company, you mean?

A. Yes, sir; and I turned it over to Emmons, my abstract and deed, I turned over to Emmons Abstract Company of St. Charles.

Q. (Mr. Watson) What did you do next?

A. I didn't have anything to do but wait until notified that my check had been sent from the War Department.

Q. Did you or did you not deliver a deed to the Kansas City Title Company? A. Yes, sir, I did.

Q. You went and signed the deed that they had pre-
[fol. 788] pared for you, the Kansas City Title Company?

A. Yes, sir.

Q. And Mrs. Andrews went with you, and she signed that deed? A. Yes, sir.

Q. I believe you said you and your wife had gone to the Kansas City Title Company and signed the deed and left it with that Company, did you not? A. Yes, sir.

Q. What happened next in connection with the transaction, Mr. Andrews?

A. Next thing, we received notice that the title and abstract had been accepted by the War Department, or Mr. McDowell on behalf of the War Department. Whatever the exact wording was, I don't remember.

Q. You don't know just what the notice was?

A. No, sir. But the communications were various. But the next thing we received was word to come to Mr. Bolton's office, or whatever it was, in St. Charles, and receive the check which was there for us waiting.

Q. Do you know for sure whether that was Mr. McDowell's or Mr. Bolton's office, or office of the Kansas City Title Insurance?

A. Kansas City Title Insurance Company.

Q. Well, did you go?

A. No, sir; not right away. I thought it would be wait-
[fol. 789] ing when we went, so there was no hurry; and we probably waited eight or ten days, or two weeks, and received notice not to come, that the checks had been stopped; it had been taken charge of by the District Attorney.

Q. And have you ever been paid the check?

A. No, sir; I have not.
Q. Now, did Mr. Schulte live on that place?
A. No, sir.
Q. He was just a crop-sharing tenant, was he?
A. Yes, sir; crop tenant.
Q. Now, Mr. Andrews, did you have some things there on the property? some personal property?
A. Yes, sir, I did.
Q. When did you vacate?
A. About the 5th or 7th of December; the exact date, I don't remember.

Mr. Blanton: Of 1940, Mr. Andrews?

Mr. Watson: Of 1940.

The Court: About what date, Mr. Andrews?

A. It was about the first week in December; Thursday the first week in December, whatever that was.

Mr. S. Watson: I think that is all.

Cross-Examination.

By Mr. Blanton:
Q. How long have you owned this property, Mr. Andrews?

Mr. S. Watson: Mr. Blanton, will you pardon me? I [fol. 790] forgot to introduce this exhibit.

Mr. Blanton: I believe you did.

Mr. S. Watson: If the Court please, I now offer in evidence the following document, which is the option to purchase the land.

The Court: What is its description? Have you got it identified now?

Mr. Watson: I have had the description identified, Your Honor.

The Court: What?

Mr. Watson: Oh, it is Defendants' Exhibit No. 1.

Mr. Blanton: To which, Your Honor, we want to object for the reasons set forth in our reply. I will not take

the time to enumerate all the reasons set forth, but we want to make formal objection.

The Court: Admitted subject to the objection.

What is it, Mr. Watson?

Mr. Watson: It is entitled "An Option to Purchase Land." Would the Court care for me to read it?

The Court: No, sir; I just wanted to know what it is.

Mr. Watson: It is numbered 2585, and is W-766-QM.

The Court: Exhibit 1 is all I want; it is the option.

Mr. Blanton: And shows Your Honor, it was dated by Mr. and Mrs. Andrews on the 19th of November, 1940, and accepted by Col. Valliant on the 27th of November, 1940, or eight days later.

[fol. 791] Option to Purchase Land

W 766 QM 2585

Know All Men By These Presents: That the undersigned Wm. M. Andrews and Bertha L. Andrews his wife for and in consideration of One Dollar ($1.00), paid by the United States of America, hereinafter referred to as the Government, the receipt whereof is hereby acknowledged, hereby agrees for their heirs, executors and assigns, to sell and convey to the Government for the consideration of Twelve thousand and no/100 dollars ($12,000.00) that certain piece or parcel of land situated in the County of St. Charles, State of Missouri, more particularly described as follows:

Lot No. Four (4) being part of Survey No. 887 and part of the Northwest quarter of Section 26 of Township 46 North, Range 2 East, is described and bounded as follows:—Beginning at the Northwest corner of said lot a stone from which a Hickory 8 inches in diameter bears South 22° E. 43 links, and a hickory 6 inches in diameter bears North 87° E. 46 links, thence North 80° E. 21.78 chains to corner from which a White Oak 30 inches in diameter bears South 60° East 39 links and a White Oak 30 inches in diameter bears South 47½° West 57 links, thence South 10° East 29.75 chains to corner from which a White

Oak 8 inches in diameter bears North 68½ East 49 links and a Black Oak 10 inches in diameter bears North 62½° West 20 links, thence South 83° West 13.64 chains to corner from which a Hickory 6 inches in diameter bears South 23° West 17 links and a Hickory 4 inches in diameter bears North 9° East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼° West 19 links and a Hickory 12 inches in diameter bears South 62° West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner on Morris line from which corner a post oak 10 inches in diameter bears South 14½° West 54 links, and a Black Oak 5 inches in diameter bears South 39½° East 43 links, thence East 4.14 chains to Morris Southeast corner from which a Hickory 10 inches in diameter bears North 43° West 50 links, thence North 10° West 25 chains to place of beginning, containing 94.46 acres, more or less.

Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a [fol. 792] commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction.

The undersigned hereby grants to the Government the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the Government of this option, which acceptance shall be within thirty (30) days after date hereof, until such time as said land is conveyed to the Government by the undersigned, the title approved by the Attorney General of the United States as required by law, and the agreed purchase price paid by the Government to the undersigned.

The undersigned further agrees that they will execute and deliver a general warranty deed conveying the fee simple title to the above described land to the United States of America, free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc.; and the undersigned will also furnish, without cost to the Government, a certificate

of title of The Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States and after examination of the deed and certificate of title by the Attorney General, the undersigned will have said deed recorded and will furnish a certificate of title of the said The Kansas City Title Insurance Company showing title to be good and marketable as vested in the United States of America free of all liens and encumbrances. In the event the title shall be unmerchantable, [fol. 793] the undersigned agrees to make said title merchantable at his own expense.

Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings.

The occupancy and use of the land by the Government as granted aforesaid shall not be interrupted, but shall continue to be enjoyed by the Government throughout the pendency of said condemnation proceedings.

This Option is executed in triplicate at St. Louis, Mo., this 19th day of November, 1940.

(s) WILLIAM M. ANDREWS

(s) BERTHA L. ANDREWS

Witness:
(s) Paul E. Williams
(s) Paul E. Williams

Accepted by and on behalf of the United States of America this 27th day of November 1940.

(s) R. D. VALLIANT,
Colonel, Q. M. C.,
United States Army.

[fol. 794] Mr. Watson: Now you can proceed.

The Court: You had another exhibit.

Mr. Watson: I had intended to offer that exhibit later, but I can offer it now. I offer in evidence, Your Honor—

The Court: Offer it as best suits you.

Mr. Watson: I think I will offer it at a later date.

The Court: Suit yourself.

Cross-Examination.

By Mr. Blanton:

Q. When did you acquire this property? When did you and Mrs. Andrews acquire it? A. July of 1934.

Q. And from whom did you acquire it?

The Court: July, 1934?

A. Yes, sir. From two banks, liquidating banks; the Bank of Hamburg and the Bank of Defiance.

Q. You handled your transactions through a Mr. Whitlow and Mr. Dalton?

A. Mr. Whitlow; I didn't know Mr. Dalton handled the transaction.

Q. You paid $1790 for this property, didn't you?

Mr. Watson: Object, Your Honor, to that evidence being immaterial and inadmissible. It was several years before.

The Court: Objection sustained.

Mr. Blanton: Why isn't, what it cost this man, competent on its value?

[fol. 795] The Court: It is too remote.

Mr. Blanton: It is only six years previously.

The Court: The Court is aware there have been some change in conditions out there in that time. I think the Court will have to recognize that.

Mr. Blanton: That might affect its probative value but not its admissibility, I respectfully submit.

Mr. Watson: He just testified it was a liquidation sale and the sale was a liquidation of a bank.

The Court: Objection sustained.

Mr. Blanton: Note our exception, Your Honor. I in due time will make a formal offer of the testimony.

Q. You, yourself, didn't live on the farm? A. No.
Q. And never had?
A. Parts of the time in the year, yes, sir.
Q. You mean you would go out there in the summer time?
A. Yes, sir; I spent my vacation out there on all days that it was possible, and week ends.
Q. What is your regular employment, Mr. Andrews?
A. Printing pressman.
Q. And during your entire ownership of this farm, you have had it rented, have you?
A. All but the first year, I believe.
Q. Has it been occupied by Mr. Schulte during that time? A. As a tenant; yes, sir.
[fol. 796] Q. Did you ever have any written lease with Mr. Schulte? A. No, sir.
Q. What was that agreement with him?
A. What we considered an average farmer's agreement, for the tenant to till the soil and receive two-thirds of the proceeds and the owner or landowner to receive one-third as rent.
Q. And how was the land cropped, say during the year 1940?

Mr. S. Watson: If the Court please, object to that, if the purpose is to go to the matter of the value in this proceeding, on the ground that the matter of the value of the land is not an issue in the proceeding, this land having been purchased pursuant to the discretionary power vested in the Secretary of War and exercised by his duly constituted representatives, Col. R. D. Valliant, the discretion being with the Secretary of War as to what should be paid for the property on the basis of an offer made by

the landowner, that being an administrative act not reviewable by the Court.

The Court: It will be admitted subject to the objection.

Mr. Blanton: The question was, Mr. Andrews, what crop was raised on the farm during the year 1940?

A. The year 1940, I believe we had wheat.

Q. How much, approximately, of the 94 acres was in wheat that year? A. The year 1940?

Q. Yes, sir.

[fol. 797] A. Twenty-one acres of wheat, and the whole, tillable, was in lespedeza or clover or grass.

Q. And as part of that agreement, who was to furnish the fertilizer? A. Half and half.

Q. You did furnish half of it that year, did you?

A. Yes, sir.

Q. Did you have any understanding with Mr. Schulte as to when he was to vacate the property? or was your lease for an indefinite term of years?

A. It was no lease; it was a tenancy from year to year.

Mr. Blanton: Of course, that is your construction of it, and I ask the answer be stricken.

The Court: Sustained.

Mr. Watson: It seems to me he asked the question, and he asked what kind—

Mr. Blanton: I want him to state the terms.

A. I say the—

Q. (Mr. Blanton) Was it in writing?

A. No, sir.

Q. An oral lease? A. It was a verbal lease.

Q. Verbal agreement between you and him?

A. Yes, sir.

Q. And as part of the agreement, you were to receive one-third of the crops, he was to receive two-thirds, [fol. 798] and you would each pay one-half of the fertilizer?

Mr. Watson: Object to that on the ground that, what the agreement was with the tenant as to compensation,

has no pertinency to the question of value. I object further on the ground the question of value is not an issue in the proceeding.

The Court: Admitted subject to the objection.

The Court: What was the division?

Mr. Blanton: I understood him to say the crops were divided two-thirds to the tenant and one-third to the owner.

The Witness: Right.

Q. But you furnished one-half of the fertilizer?
A. Yes, sir.
Q. Now, did you agree to furnish anything else other than the fertilizer?
A. No, sir; nothing but the ground.
Q. Who paid for the delivery of your share of the crop to the market? A. I did, yes, sir.
Q. And who paid the taxes on the farm? A. I did.
Q. Now, during the year 1940, your entire income from that farm was less than $100, wasn't it?

Mr. Watson: Object to that, the income from the farm during the year 1940 is entirely immaterial and inadmissible for the reason that it doesn't establish value, and that value is an improper element.

[fol. 799] The Court: It will be admitted subject to the objection.

A. Yes, sir; it was more than $100; I think it was $138, but I do not remember exactly.
Q. You paid $32 out of that for fertilizer that year, did you not?
A. No, sir; it was $12, I believe.
Q. You filed an income tax return for that year, did you not? A. Yes, sir; I did.
Q. And didn't you correctly return the amount of your income from the farm? A. Yes, sir.
Q. I hand you what purports to be a certified copy of your income tax return. I will ask you to look at the second sheet of that photostatic certified copy.
A. Yes, sir.

Q. Does that refresh your recollection as to what that income from the farm was for that year? A. Yes, sir.

Q. Now, what did you pay for fertilizer? A. $32.

Q. And what did you pay for hauling your share of the crop to market? A. Five twenty.

Q. So your net income from the crops that year amount-
[fol. 800] ed to what?

A. One hundred dollars, wasn't it?

Q. $100.80 A. Yes, sir.

Q. Now, what tax did you pay on that farm for the year 1940? A. I didn't pay any, yet.

Q. What was the amount of the tax?

A. I haven't seen it; I don't know.

Q. What did you pay tax on that farm for the year 1939?

A. Thirty-two or thirty-four dollars.

Q. Was that the tax, about the amount of the tax that was paid on an average, year after year?

Mr. Watson: Object to that question; object to any testimony as to the average tax that was paid on the farm from year to year, on the ground that it is not going to the value, and on the further ground that value is not an issue in this proceeding.

The Court: Overruled.

Mr. Watson: I further move that the testimony as to what the tax was in 1939 be stricken out on the same grounds heretofore stated.

The Court: Overruled.

Mr. Blanton: The question I asked you, that was about the average tax that you paid annually?

A. Yes, sir; it was.

[fol. 801] Q. It didn't change very much in the years?

A. Maybe a few cents, or a half a dollar.

Q. Had there been any change in your tax rate before and after the construction of the Daniel Boone Bridge?

A. Not that I know of.

Q. From the time you bought the land in 1934 up until about the time that you optioned it to the Government, had the tax remained more or less constant?

Mr. Watson: If the Court please, object to that on the ground it has already been covered, for one thing; and on the further ground that whether there was a change in the tax—amount of the tax assessment—is entirely immaterial and not going to the question of value, value not being an issue in this proceeding.

The Court: Overruled.

A. If ran about the same, as well as I can remember. I don't remember actually what it was, for '34, '35, '36, and '37, and '38.

Q. Did you own any other farm property other than this farm, out there in the Weldon Springs area, which you optioned?

A. Any other farm in that locality?

Q. Yes, sir. A. No, sir.

Q. Did you own any other farm anywhere?

A. No, sir.

Q. You sold some timber off of this farm, too, did you not? A. Yes, sir.

[fol. 802] Q. When did you make the sale of timber off of the farm?

A. In early November; I don't remember the date; probably the 5th or 10th of November.

Q. Of the year 1940? A. Yes, sir.

Q. Was that before or after you optioned this property?

A. Before I had optioned the property, before I had seen the agent.

Q. And how much timber did you sell from the property that year? A. $650.

Q. Had you sold any other timber off of the premises from the time you purchased it in 1934, other than the $650 worth?

A. I hadn't sold any; no, sir.

Q. Your answer seems to imply that there was something else; did you use some for firewood?

A. Used some for firewood and the fence posts—quite a few things like that.

Q. But you didn't market any of it only what you used on the place itself? A. No, sir.

Q. To whom did you sell this timber in the fall of 1940?

A. Freeman Brothers Stave Company, I believe was the title.

Q. Did you sell all of the good merchantable timber on the place?

[fol. 803] A. I understood, yes, sir; all of the larger timber.

Q. And your contract so provided?

A. Yes, sir; it did.

Q. When was the timber removed, Mr. Andrews?

A. The timber was not all removed.

Q. How much of it was removed?

A. I personally can't say; Freeman Stave Company told me that $300 worth had been removed.

Q. They paid you the full amount, though, did they?

A. They did.

The Court: How much was that?

A. $650.

Q. Now, did anybody live on the premises, Mr. Andrews?

A. No one.

Q. Except the time you were out there during your vacation period?

A. No, sir; no one else.

Mr. Blanton: I hand you two pictures, which I will ask to be marked "Government's Exhibits 3", and "4". (The papers are marked as requested).

Q. I hand you Government's Exhibits 3 and 4 and will ask you if these are fair representations of the buildings that were on the farm during the fall of 1940?

A. Yes, sir, they are.

Q. Now, I hand you Government's Exhibit 3, Mr. [fol. 804] Andrews, and I will ask you what Government's Exhibit 3 is?

A. It is a house.

Mr. Watson: If the Court please, object to questioning the witness about the exhibits on the ground that they

go to the theory of value, or they are introduced for that purpose, and value is not an issue in the proceedings.

The Court: Overruled.

A. It is a house.

Q. That was the house on the premises, only house on the premises? I notice to the right of the house there seems to be an outbuilding with two doorways. What is that outbuilding?

A. Stable and henhouse, one little addition on the side that was used at one time for chickens.

Mr. Blanton: I notice Government's Exhibit 3, which shows the chimney to this house does not extend to the ground, but is built upon a support. Do I read that picture correctly?

A. As a fellow says, all I want is a place for the smoke to go out. I guess it would go out, and apparently it did, and went out good, because that was tile lined.

Q. I hand you Government's Exhibit 4, and ask you what that is?

A. That is a cornerib and granary, it served the purpose very well.

Mr. Blanton: I would now like to offer in evidence Government's Exhibits 3 and 4.

The originals of United States Exhibits 3 and 4 are on file with the Clerk of the Circuit Court of Appeals.

[fol. 805] Mr. Blanton: Have you seen these, Sam?

Mr. Sam Watson: I merely object to the offer of these exhibits for the purpose of the record.

The Court: Overruled.

Q. Mr. Andrews, approximately how much of this farm of yours had timber of one quality or another on it?

A. Between 16 and 20 acres.

Q. And, again, would you tell me how much acreage you had in wheat that year?

A. Twenty-one.

Q. Twenty-one acres?

A. Yes, sir.

Q. Now, Mr. Andrews, when you purchased this property back in 1934, what if any improvements did you put on the farm from that time up until the time you optioned the place to the Government in the fall of 1940?

A. What improvements?

[A.] Yes, sir.

A. Physical improvements?

Q. Yes, sir.

A. We practically built the house which you have there on the exhibit.

Q. There was not any house on the place at the time you bought it?

A. That was there, but it wasn't in very good shape, [fol. 806] and we did quite a bit of work on it to make it livable. We also had a 165 or 160 foot well, drilled well, which is worth a lot of money on any farm.

Q. What did that cost you, Mr. Andrews, to drill it?

A. What?

Q. To drill the well?

A. $244.50.

Q. And when did you drill that well, or have it drilled?

A. 1937, I believe. I will say the spring of 1937, I believe.

Q. Now, this agreement you had with your tenant; that was entered into, I believe you stated, after you had signed the option with the representative of McDowell?

A. Yes, sir.

Q. You didn't confer with your tenant at the time you signed the option?

A. No, sir.

Q. I believe your answer was, No?

A. No; yes, sir.

Q. Now, did you learn about this mass meeting which was out there, held at the Howell schoolhouse?

A. Yes, sir; I read about it.

Q. Were you one of them? You say you read about it?

A. I heard about it.

[fol. 807] Q. Were you one of the people who attended there?

A. I attended there; yes, sir.

Q. And you heard what went on there?

A. Well, as much as I could. I was rather far back; I had to stretch my imagination quite a bit.

Q. Did you read about the meeting after you returned home, in the newspapers?

A. Yes, sir.

Q. Read the Globe-Democrat article, did you?

A. I can't say whether it was the Globe-Democrat or not; I read about it, yes, sir, in some daily paper.

Mr. Blanton: Your Honor, I don't want to persist in asking questions that Your Honor has already sustained an objection to, but in order to make my record, I would like to ask some question about the purchase back in 1934.

The Court: Proceed.

Q. Mr. Andrews, I will ask you if this property, that you bought from these two closed banks through Mr. Dalton, was purchased at a court house sale, or was it as a result of negotiation and a private sale between yourself and Mr. Dalton?

A. It was a private sale, as far as I know, between Mr. Dalton and myself.

Q. And do you know whether or not the matter was submitted to the Circuit Court of St. Charles County for [fol. 808] approval by the Court, and a formal order of that Court entered?

A. No, sir, I would not know that. I received a Commissioner's deed. I don't know who issues a Commissioner's deed.

Q. Didn't the deed recite that the order had been authorized, that the execution of the deed had been authorized by the Court?

A. It possibly would; I don't know.

Mr. Watson: If the Court please, I think the deed itself is the best evidence.

Mr. Blanton: I have it here; I am going to offer it to him now. I will ask this document be marked "Government's Exhibit 5." (The document is marked as requested)

Mr. Watson: If the Court please, object to this line of evidence that Mr. Blanton is entering into, on the ground this sale is also too remote in point of time to be material in the question of value here.

Mr. Blanton: Of course, it is our view, Your Honor, with all due respect to Your Honor's former ruling, that goes to its probative value and not its competence or admissibility. As a matter of fact, a case went up from Judge Collet's Court, the Ramming Real Estate case; this was the one argued and decided by the Court of Appeals in September, in which there was offered an offer of proof showing values in the transactions back as far as ten years.

The Court: Of course, I know the regulations in the [fol. 809] District Attorney's office where they have those cases where the parties have been trying to show back thirteen or fourteen years. I was inclined to stand on the theory that there must have been a change in conditions when the new Highway and this bridge were erected there—six years?

Mr. Blanton: Six years—1934.

The Court: It seems to me the change of circumstances, of which the Court had knowledge, the opening of this new highway and the erection of this bridge, might make that too remote, where it would not be if it hadn't been for that intervening.

Mr. Blanton: I call Your Honor's attention that the record here shows that would not affect the yield of the crop or the income from the farm, neither has it affected the amount of taxes the owner has paid on the property; so in St. Charles they have not felt there has been any change in value.

The Court: It would not affect the crop yield.

Mr. Watson: Of course, the crop yield and the amount of tax are not the only elements that go into the matter of value.

Mr. Blanton: I grant you that, I am conceding that, Sam; but I am just making my offer because I think it is competent, and the Court, I think, can give such weight and credibility to it as he thinks it deserves. I want to develop what it cost this gentleman six years earlier, and whatever improvements he has put on it since seems to be quite a tremendous increase from 1700 and up to 12,000 in a period of six years.

[fol. 810] Mr. Watson: As a further objection, I object on the ground assessed valuation of property is not admissible.

Mr. Blanton: We haven't tried to show that; I will concede that is not competent.

The Court: I think, under the circumstances, the Court does know and it was brought out about the development of the new highway 40 and the bridge. It is subject to the objection.

Mr. O'Bryan: If you are permitting Mr. Blanton to go into that, subject to the objection, may we get an understanding with Mr. Blanton, as he is insisting upon putting in this evidence, that we can also show without his objection—because I can't blow hot and cold, and I do not think Mr. Blanton wants to—that we are entitled to show the accessibility to St. Louis after this highway was constructed and this bridge built, that we should show and can show that they were building riding [acadamies]?

The Court: Certainly you will be permitted to show that.

Mr. O'Bryan: We are not going to be confined just to the crop value of the land?

The Court: No, sir; if you offer that, it will be admitted.

Q. (Mr. Blanton) I hand you Government's Exhibit No. 5, Mr. Andrews, which has been certified to by the Recorder of Deeds of St. Charles County as being a copy of a deed conveying the property involved in this case, to you, and as being recorded in Book 179, at page 426 of the Deed Records of St. Charles County, Missouri, and I will ask you if this appears to be a certified copy of the deed [fol. 811] conveying this property to you (handing a paper to witness)?

A. After you eliminate a few of these "wherefores" and "whereases", that is probably it.

Q. The consideration mentioned in the deed is correct, is it not?

A. As to purchase price, that is right; yes, sir.

The Court: How much?

Mr. Blanton: $1750, Your Honor, with $2 revenue stamp attached.

Mr. Blanton: I think that is all.

Redirect Examination.

By Mr. Watson:

Q. Mr. Andrews, when you bought your farm, what were the conditions with reference to roads, taking, first, the road that ran immediately in front of the farm?

A. The road that ran—there are roads on three sides of the farm, a gravel road on three sides of the farm; the gravel roads on the north and west have not been changed; the gravel road on the east which was then, when I bought it, a small, narrow county road, quite good in most all weathers; in 1938 or 1939—I don't remember the exact date—all the property owners on the sides of this road, I believe, gave 10 feet of their ground on each side of the road, or 5 feet on each side of the road, to widen and re-gravel and resurface the road, straighten it out and put in [fol. 812] new bridges, all the way from the town of Howell on the south to my farm, northeast corner of my farm where the road turned east and went as near directly as it could to the new concrete Highway 61.

The Court: Where is that place located?

Mr. O'Bryan: If the Court please, here is a good map.

Mr. Blanton: I have not seen it.

Mr. O'Bryan: We will have it properly identified after a while, and put it in. Your Honor please, we will have to withdraw this map, there is only one in existence; that belongs to the Farm Agent, but we are going to have one made just exactly like it and brought in here for the record.

The Witness: If you will hand it to me, I will show you.

Mr. O'Bryan: Let Mr. Blanton examine it, first.

Mr. Blanton: I would suggest you make the proof. I can't make any admissions, for I don't know, I haven't seen the map before; I doubt if Mr. Andrews has.

The Court: Proceed with the case.

The Court: Where is your place located with reference to Howell?

A. The place is two miles and a half—the road from Howell comes by north and south, is the one due north and south. As they go, they wander around a little bit, but to the corner, the northeast corner of my farm, is two miles and a half north of Howell. My farm runs along the road [fol. 813] south towards Howell for five-tenths of a mile. I am due north of Howell two and a half miles.

Court: What is your relation to Hamburg?

A. Hamburg is farther south than Howell, but I am north of Howell two miles and a half, on the highway.

The Court: How far are you off of new highway 40?

A. Two miles.

The Court: All right, proceed.

Q. (Mr. Watson) Now, you were telling about the road that runs by your place, and you had gotten to the corner by your place where the road turns east.

A. Where the road turns east, and they widened and regraded and resurfaced that highway all the way from Howell to the northeast corner of my farm, and then east over the old county road they had there, still widened it to the new Highway 61, concrete highway, a matter of two miles from the northeast corner of my farm—a new graveled and surfaced highway.

Q. And widened?

A. And widened.

Q. Was it a road over which you could make a reasonable speed with an automobile?

A. Yes, sir; it was a good road.

Q. When you bought that property, was there a project at Weldon Springs?

A. No, sir.

Mr. Blanton: You don't mean Weldon Springs; you are referring to Daniel Boone?

[fol. 814] Mr. Watson: Yes; had the Daniel Boone Bridge been built?

A. No, sir.

The Court: That is right at Weldon Springs?

Mr. Blanton: I am sorry, I do not know. I thought he meant in the area.

Q. (Mr. Watson) Your answer was, No?
A. No, sir; there was no bridge at Weldon Springs.
Q. And the new bridge had not been built?
A. No, sir; the new concrete highway hadn't been built.
Q. Now, what had you done with reference to the improvement of the soil, humus crops, and so forth?
A. Immediately upon starting to cultivate the farm with Mr. Schulte, we began sowing every fall or every spring, in with our wheat, lespedeza, which we would leave stand on the soil or go in the soil until such time as we would turn the land under again, turn the land over and break it up, and we would turn the lespedeza into the soil and increase its productivity and build up its fertility.
Q. Did you get a good stand of lespedeza?
A. Yes, sir; lespedeza comes thick as the hair on a dog's back, a knee-high humus.
Q. And you turned that under?
A. Yes, indeed.
Q. Did you put any lime on there?
[fol. 815] A. Yes, sir; fourteen tons of lime on there the last year we owned it.
Q. Now, in that connection, in your opinion did this changed condition enhance the value of that property?
A. Well, the yield of wheat increased apparently, yes, sir, from year to year.

The Court: How much?

A. One year on 30 acres of wheat we produced 516 bushels, which is seventeen bushels to the acre, I believe—I think the last year we harvested our wheat; that would be 1939.

Mr. Blanton: No, sir, 1940.

Mr. Watson: 1940, yes, sir.

A. Yes, sir; in the year of 1940, I think we had 525 bushels of wheat on 21 acres, which is about 25 bushels to the acre, I believe.

The Court: Is that the same practically?

A. Just about, yes, sir. That is as close as I can remember those figures, and I think that is about right.

Mr. Watson: That is all.

Recross Examination.

By Mr. Blanton:

Q. But notwithstanding that fact, your income from that, after you deduct your fertilizing or liming, your hauling, and tax, amounted to only about $60, didn't it?

A. I didn't take the tax out of there, but the hauling and fertilizer—$100, about.

[fol. 816] Q. And after you deducted $32 for tax, that left $68, did it not?

A. Yes, sir; but I got to live on there and have the fun of it.

The Court: Announce a 5-minute recess.

Thereupon, at 11:40 A. M., April 3, 1942, a recess of 5 minutes was announced. The proceedings then continued as follows:

Q. I would like to ask you one more question: You stated you had put some repairs on these buildings from the time you purchased—what was the amount of the outlay that you put on?

A. Actually, I don't know, but approximately I can tell you we put 1,000 feet of lumber, and necessary doors, windows, hardware and flooring. Flooring was not included, however. And the other necessary repairs, minor repairs to the buildings, and a board here and there, or parts of a roof, nailed it down. It cost to buy material to do it with.

Q. Did you tell Mr. John Carmody, who was interested in this area out there in behalf of the Government, that you made an outlay of approximately $200?

A. No, sir, I don't think so. I may have, I don't remember. I don't think so.

Q. Are you now telling the Court you don't remember what the outlay was?

A. No, sir; it was approximately $500.

Q. Didn't you tell Mr. Carmody it was $200?

A. No, sir.

[fol. 817] Q. Did that include the well.

A. No, sir; the well is in addition.

The Court: That is just on the house?

A. Yes, sir; on the buildings.

Mr. Blanton: That is all.

Redirect Examination.

By Mr. Watson:

Q. On the well, did you put a concrete top to it?

A. Yes, sir.

Q. And what did that cost you?

A. That was in addition, of course, to the well. In actual money, that probably didn't cost very much, but the sand and gravel I hauled about a mile and a half from Dardenne Creek, with a gunnysack in the back of my car, and that was rather expensive.

Mr. Watson: That is all.

Mrs. William Andrews of lawful age, produced, sworn and examined, testified on behalf of the defendants, as follows:

Direct Examination.

By Mr. Watson:

Q. Your full name.

A. Mrs. William Andrews.

Q. Are you the owner with your husband of this tract of land in St. Charles County? You heard the testimony here?

A. Yes, sir.

Q. You are a joint owner with him?

[fol. 818] A. Yes, sir.

Q. Or were a joint owner with him?

A. Yes, sir.

[A.] This is your signature on this instrument, is it?

A. Yes, sir; it is.

Q. About when did you yield possession there or move your things out, Mrs. Andrews?

A. Sometime the first week in December, I believe, 1940; I don't remember the exact date.

Mr. Watson: That is all.

Mr. Blanton: No questions.

JOE SCHULTE of lawful age, produced, sworn and examined, testified on behalf of the Defendants as follows:

Direct Examination.

By Mr. Watson:

Q. State your name, please.

A. Joe Schulte.

Q. Are you familiar with the Andrews tract in the TNT area?

A. Yes, sir; we had it rented.

Q. You had it rented?

A. Yes, sir.

Q. Did you sign an agreement to give up possession upon acceptance of an option by the United States Government?

A. Yes, sir.

[fol. 819] Mr. Blanton: In order that I may be consistent, I would like to offer objection to any testimony relative to any deal he might have made with the tenant for possession, on the theory that is not a proper element of damages and doesn't go into what constitutes reasonable value of the farm.

The Court: It will be admitted subject to the objection.

Q. I believe you said you signed that; that is your signature?

A. Yes, sir.

Q. And what is the other signature there?

A. That is Schulte Brothers. That stands for my brother, and this is by Joe; I signed for him and me both. That is our signature.

Q. Did you give possession of this property?

A. I sure did.

Q. When?

A. We signed up, I imagine, about the last of November, or 1st of December, along in there somewhere. I don't remember the date.

Q. And when did you sever any occupancy you had with the property?

A. Well, when we signed that paper.

Q. You had nothing more to do with the property after that?

A. We moved off and left the wheat crop, and signed up for it, and gave possession.

Q. What was your arrangement about the tenancy, with [fol. 820] reference to the life of the tenancy? How long was it to last? your arrangement with Mr. Andrews?

A. As soon as we agreed, I was the only tenant he had, and we rented the crop land from year to year.

Mr. Watson: That is all.

Cross-Examination.

By Mr. Blanton:

Q. Did you make a separate arrangement with him every year, Mr. Schulte?

A. No, sir, not exactly, the rent and everything would be the same; it was in the fields that he would want to put in wheat or something, and agree on it.

Q. Did you have an agreement with him in the spring of 1940 for the rental for 1940?

A. You mean 1941?

Q. No, sir; I mean for the year 1940. I am talking about before the TNT plant was discussed. For the year 1940, did you have an agreement early that year that you could have it for the year 1940?

A. Sure.

Q. And when did you make that agreement with him?

A. I wouldn't know the exact date; we did that when we met, and the acreage that had wheat, we had to have some kind of an agreement.

Q. And that agreement was for the crop in 1940?

A. Yes, sir; we also agreed for 1941, we were to plant [fol. 821] some corn.

Q. And how much wheat did you have in on this place when you entered into this agreement that Mr. Watson has exhibited to you, during the fall of 1940?

A. I think it was right around 20 acres.

Q. Right around 20 acres?

A. Yes, sir.

Q. When did you drill that wheat, Mr. Schulte?

A. The first part of October.

Q. What property did you have, personal property, did you have on this farm, other than your interest in this wheat crop?

A. Well, nothing outside of crops.

Q. You didn't keep any of your machinery on the farm, did you?

A. We left several plows standing there occasionally.

Q. I know, but did you keep them in any of these buildings?

A. No, sir.

Q. You didn't use the buildings for any purpose at all, did you?

A. No, sir; he used them for his purpose.

Q. You rented a good many farms around there, didn't you?

A. Yes, sir.

Q. You rented the Mertia Callaway farm, I believe, that was tried in another court the early part of this week?

A. Yes, sir.

Q. What rent did you pay Miss Callaway?

[fol. 822] Mr. Watson: If the Court please, I object to that on the ground it is inadmissible in this proceeding. The Callaway case has been submitted, and it has no relationship to this proceeding.

Mr. Blanton: It tests his credibility, and I want to know how much he knows about reasonable value of properties. He says he has rented several of them. I will grant you that he doesn't fix the value of this farm.

The Court: What basis did he say he was renting this on?

A. A third of the crop.

Mr. Blanton: And the owner to pay half of the fertilizer and liming.

The Witness: Well, he did the liming himself; he paid for the liming; he was taking care of that.

The Court: Paid all of it.

A. Liming, but not the fertilizer.

The Court: He paid all the liming, and you paid for half the fertilizer?

A. Yes, sir.

The Court: You got how much of the crop?

A. Two-thirds.

The Court: All right; he may answer.

Q. What did you pay Miss Callaway for her 94 acres per year?

A. I don't see her; should I discuss that?

[fol. 823] Q. The Court says you may answer.

A. I might be able to rent it cheaper than someone else.

The Court: All right; what did you rent it for?

A. Well, I couldn't exactly say.

The Court: Why not?

A. We gave $125 cash rent for the pasture, then she got a third of the corn, and then she got some allotment. She got a third of the crop, whatever was cropped.

Q. You didn't have but five or six acres in crop on her place?

A. It was more than that; it was around close to ten acres.

Q. Did you hear the other witnesses testify yesterday there were five to seven acres in it.

Mr. Watson: He was not in the court-room.

Mr. Blanton: I am asking if he heard it. If he didn't, he can say so.

A. I didn't measure that.

Q. How many acres of wheat did you have on this Andrews's place during the [treshing] season [season] of 1940?

A. Somewhere around 20 acres.

Q. And your share of that amounted to about $200, did it, Mr. Schulte?

A. It amounted to quite a bit more. I think we got a better price. It seems like to me we stored our wheat; I can't tell you.

Mr. Blanton: I think that is all, Your Honor.

[fol. 824] Mr. Watson: That is all.

Mr. Watson: If the Court please, I now offer in evidence Defendant's Exhibit 2.

Mr. Blanton: To which we object for the reason that whatever sum Mr. Andrews might have paid Mr. Schulte for possession is not a proper element of damage in this case; that that is the one that should be absorbed by the landowner; and it isn't competent nor binding upon the Government.

Mr. Watson: If the Court please, this is certainly not offered for the purpose of showing any element of value; it is offered for the purpose of showing that the landowner made arrangements with his tenant whereby the landowner would be able to give full and complete possession to the Government pursuant to option of contract.

Mr. Blanton: We admit he did that, Mr. Watson.

Mr. Watson: I am glad you admit it, and I would like to have the document in evidence for further evidence.

The Court: What is the ground of your objection?

Mr. Blanton: The ground of my objection is that the fact that he may have paid Schulte $300 for possession constitutes no evidence as to the value in this case, for the reason that the inconvenience to tenant, costs of removal and items of that kind are not elements of damage.

The Court: It will be admitted subject to the objection.

[fol. 825] Defendants Exhibit 2.

For the consideration of $300.00 we do hereby consent to Wm. M. and Bertha L. Andrews giving an option to the United States of America covering the sale of his property which entails immediate possession by the Government.

I am a tenant on the Andrews farm, the situation has been fully explained to me and I enter no objection and do hereby agree to remove all my personal property from

the premises in accordance with the option agreement given to the United States of America by Wm. M. and Bertha L. Andrews.

This agreement will be effective when the option on this property is accepted by the United States of America.

(s) SCHULTE BROS.
(s) By Joe Schulte,
Tenant.

Land Owner.

Witness

[fol. 826] C. H. EWALD of lawful age, produced, sworn and examined, testified on behalf of defendants as follows:

Direct Examination.

By Mr. Watson:

Mr. Watson: If the Court please, under the agreement I think it is understood, is it not, that I am adopting so much of his testimony as shows the capacity in which he acted?

Mr. Blanton: That is perfectly agreeable, Mr. Watson, except I should want it understood also I am making my same objection in this case that I made in the other case, and I am objecting for the reasons set forth in my reply to any evidence of any action taken under this option—this purported option. But you do not have to repeat the testimony about who he was and that he was a representative of the Kansas City Title Company and said he didn't have a contract with the Government, and so forth.

Q. (Mr. Watson) Did you testify in the other case?
A. I did; yes, sir.
Q. The Callaway case, United States vs. Callaway?
A. I did, yes, sir.
Q. In that case, you testified as to what your connection with the Kansas City Title Company was in connection with this TNT project, did you not?

A. Yes, sir.

Q. Have you with you the files of your office in relation to the deal of William M. Andrews and Bertha Andrews, [fol. 827] his wife?

A. I do.

Q. Did you prepare a certificate of title on the Andrews tract?

A. I did, yes, sir.

Q. And what did you do with that?

A. Preliminary certificate of title was sent to Washington, D. C., to Hon. Norman M. Litell, Attorney-General Land Division of the Department of Justice.

Q. Did you prepare a deed for the purpose of conveying the Andrews tract?

A. I did, yes, sir.

Q. Did you notify Mr. and Mrs. Andrews to come in the office and sign the deed?

A. Yes, sir.

Q. Did they do so?

A. Yes, sir.

Q. Did you see them sign it?

A. Yes, sir; I am quite sure they signed the deed in my presence.

Mr. Watson: I ask that this be marked "Defendants' Exhibit 3." (The paper is marked as requested).

Q. Did you send copies of that deed to the United States Government?

A. I did, yes, sir; two copies.

[fol. 828] Q. To whom did you send them?

A. To Hon. Norman M. Litell of the Department of Justice. They went with the preliminary certificate of title.

Q. Will you relate to the Court, then, the progress of this Andrews' transaction from that point?

Mr. Blanton: Without wanting to encumber the record with a lot of objections, I would like it understood I am objecting to what steps were taken pursuant to an attempt to carry out this purported option by Mr. Ewald, and also object for the reasons set forth in our reply.

The Court: Admitted subject to the objection.

A. The preliminary certificate of title, certified copies of deed and other related papers, were sent to Washington

on January 6, 1941. The next thing that we heard was a letter received from the War Department under date of January 22, 1941, sending us a check and returning the certificate of title.

Mr. Blanton: I think the letter would be the best evidence.

Mr. Watson: Have you that letter? (A paper is passed to Defendants' Counsel.)

Mr. Watson: Will you mark this "Defendants' Exhibit 4?"

(The letter is marked as requested.)

Mr. Watson: I now offer in evidence a letter dated January 22, 1941, addressed to the Kansas City Title Insurance Company, 106 South Main Street, St. Charles, Missouri, on War Department stationery, signed by C. J. Harrold, Major QMC, which letter I will ask Mr. Ewald to [fol. 829] read and explain. You started, Mr. Ewald with your narration as to the progress of the thing, and got to the letter of January 22, 1940.

Mr. Blanton: There is a lot of that letter that doesn't refer to the transaction. I am assuming you are not going to encumber the record with that?

Mr. Watson: No, sir; we do not desire to encumber the record with anything but what pertains to this transaction.

The Witness: Do you want me to read the letter, Mr. Watson?

Mr. Watson: I think, Your Honor, we should have the whole letter in evidence.

Mr. Blanton: I don't care, I am objecting to the whole thing.

Mr. Watson: Your objection will go to that, then.

Mr. Blanton: Yes, sir; and the further objection, it deals with a lot of transactions which are not pertinent to this particular case.

The Court: Why burden the record with anything that is not necessary?

Mr. Blanton: There are many tracts involved which are not involved in this suit.

Mr. Watson: There is no particular purpose.

The Court: Do not put in the record anything that is not necessary.

Mr. Watson: Does Your Honor desire to have him limit his reading to that part that pertains?

[fol. 830] The Court: What other purpose? It will be admitted subject to the objection.

Mr. Watson: Will you proceed to read the letter only insofar as that [that] pertains to the Andrews tract?

Mr. Ewald: "Attention C. H. Ewald."

The Court: Who is the letter from and addressed to?

A. The letter is on the stationery of the War Department.

The Court: What is the date of it?

A. January 22, 1941.

The Court: From whom to whom?

A. On the stationery of the War Department, signed by C. J. Harrold, Major QMC, Assistant.

The Court: To whom?

A. Addressed to the Kansas City Title Insurance Company, 106 South Main Street, St. Charles, Missouri. Attention C. H. Ewald.

"Dear Sir:

You will find herewith enclosed preliminary opinions of the Attorney-General, together with deeds, preliminary guaranteed certificates of title, photostatic copies of option agreement, checks and other related papers covering lands sold to the United States by the following vendors."

Then appears a long list of names, among others, "William M. and Bertha M. Andrews, Case No. W-766 QM 2585, number of acres 94.46, amount of check $12,000, check No. 796,379.

"It is requested that the necessary steps be taken to [fol. 831] eliminate the objections referred to in the Attorney General's letters above mentioned, and when such action has been taken and you are in a position to issue a final certificate of title showing the vesting of a valid title in the United States of America subject only to any rights of way or easements, the inclosed checks for the valance thereof due the vendors may be paid.

"Upon completion of the above action, your finan certificates of title, the original recorded deeds, and other related papers should be transmitted direct to this office.

"For the Quartermaster General.

Very truly yours,

C. J. HARROLD."

Q. Now, Mr. Ewald, that letter mentioned opinions of the Attorney General? A. Yes, sir.

Q. Have you the one that was transmitted pertaining to the Andrews tract? A. I do.

(A letter is marked "Defendants' Exhibit 5")

Mr. Watson: I now offer in evidence Defendant's Exhibit 5, being a letter dated January 13, 1941, addressed to the Honorable Henry L. Stimson, on the stationery of the office of the Attorney General, Washington, D. C., addressed to the Hon. Henry L. Stimson, Secretary of War, Washington, D. C., which I will ask Mr. Ewald to read.

[fol. 832] A. This letter is signed by Robert H. Jackson, Attorney General, dated January 13, 1941, addressed to Hon. Henry L. Stimson, Secretary of War, Washington, D. C.

"My dear Mr. Secretary:

"An examination has been made of the title data relating to 94.46 acres of land, more or less, Tract No. 124, Weldon Springs Ordnance Plant in St. Charles County, Missouri. This land is to be acquired for a consideration of $12,000.00, by authority of existing legislation. The file number of this Department is 33-26-193-101.

"The land is described in the enclosed copy of deed dated December 14, 1940, from W. M. Andrews to the United States of America.

"The certificate of title, No. N-1344-109, dated November 30, 1940, was prepared by the Kansas City Title Insurance Company, and is satisfactory.

"The certificate and accompanying data disclose the title to be vested in W. M. Andrews and Bertha Andrews, his wife, subject to: (1) All taxes and assessments. (2) Rights or claim of persons in possession. (3) Mechanics' liens, if any, not shown of record. (4) Judgments, liens and bankruptcy proceedings, if any, which may be disclosed by an examination of the records of the Federal Court for the district where the land lies. (5) Rights of the United States under the executed deed. (6) Rights, if any, under the timber contract noted at Item 7 of Schedule B of the certificate. (8) Easements for public roads which your [fol. 833] Department has determined will not interfere with the contemplated use of the land. (9) Possible easements noted at Item 6 of Schedule B of this certificate.

"When the above objections numbered 1, 2, 3, 4, 6 and 7 have been met, the deed to the United States, of which the enclosed is a copy, has been properly stamped and recorded, the purchase price has been paid, and new certificate of title has been obtained showing the vesting of a valid title in the United States of America, and this Department has been informed in writing that the easements noted at objection No. 9 will not interfere with the contemplated use of the land the title will be approved subject to easements at objections Nos. 8 and 9.

"The certificate of title and related papers are enclosed.

Respectfully,

ROBERT H. JACKSON,
Attorney General."

Q. Now, Mr. Ewald, will you proceed with the narration of what took place in connection with this Andrews transaction?

A. After receiving that letter with a check enclosed we checked the files to ascertain whether or not all of the re-

quirements were complied with. When we satisfied ourselves they were, we notified Mr. and Mrs. Andrews to come to the office for the purpose of making a settlement.

Q. Now, this Exhibit No. 4 mentions also a check; was there a check transmitted?

[fol. 834] A. There was a check in that letter for $12,000, payable to Mr. and Mrs. Andrews, W. M. Andrews and Bertha Andrews.

Q. Now, what did you do with reference to the check?

A. That check, like all other checks, we immediately placed in a lock box in the vault of the First National Bank at St. Charles.

Q. Proceed to tell the story.

A. Mr. and Mrs. Andrews did not come into the office to make settlement prior to the time that payment was stopped. Mr. Ewing Wright of Washington, of the Attorney General's office, called at our office on Monday following February 7th, which was on Friday, and called again the following day, and he picked up this check with the other checks that we had on hand.

Q. Did he say anything about whether you were to make further payments under these Weldon Springs transactions?

A. No, he did not. I asked him about that. He said he was not in a position to say. His instructions were to pick up these checks and make an investigation, and he had no instructions and didn't say anything about any further future payments.

Q. Did you have any instructions from any source not to make further payments?

A. We received no further checks.

Q. But did you have any instructions from any other source not to make further payments?

A. No, sir; no instructions.

[fol. 835] Q. Were you notified by Mr. McDowell's office that some instructions had come?

Mr. Blanton: Of course, we object to what Mr. McDowell might have instructed Mr. Ewald.

The Court: Objection sustained.

Mr. Watson: Now, will you hand me the deed, Mr. Ewald? (Defendants' Counsel receives a paper from the

Witness) This deed has already been marked "Defendants' Exhibit 3," which I offer in evidence.

Mr. Blanton: To which we object for the reasons heretofore given. The deed was not recorded by the Government, it was recorded by the agent of the landowner; it would not be binding on the Government. And for the reasons set forth in our reply.

The Court: It will be admitted subject to the objection.

[fol. 836] (Defendants' Exhibit 3.)

Form 25 Warranty Deed. Tract No. 124

This Indenture, Made on the 14th day of December, A. D., One Thousand Nine Hundred and Forty by and between

W. M. Andrews and Bertha Andrews, husband and wife, of St. Charles County, Missouri parties of the first part and United States Of America and its assigns, party of the second part,

Witnesseth: That the said parties of the first part, in consideration of the sum of Twelve thousand ($12,000.00) Dollars, to them paid by the said party of the second part, the receipt of which is hereby acknowledged do by these presents Grant, Bargain and Sell, Convey and Confirm unto the said party of the second part and its assigns, the following described lots, tracts or parcels of land, lying, being and situate in the County of St. Charles and State of Missouri, to-wit:

Lot No. 4, being part of U. S. Survey No. 887 and part of the Northwest fractional quarter of Section 26, Township 46 North, Range 2 East, described and bounded as follows: Starting at the point where the north line of fractional Section 26, Township 46 North, Range 2 East joins the West line of U. S. Survey No. 887 for the point of beginning, thence North 10 degrees West 25 chains to the Northwest corner of said survey, thence along the north line of said survey N. 80 degrees East 21.78 chains, thence south 10 degrees East 29.75 chains to corner, thence South 83 degrees West 13.64 chains to corner, thence South 23.40 chains to corner, thence West 13 chains to corner, thence North 25.64 chains to corner, and thence East 4.14 chains to the place of beginning. Subject to County Roads.

(Here are inserted one $5.00, four $2.00 and two $0.10 documentary stamps.)

It is the intention of grantors herein not only to convey all land as described above but also, all land incident thereto claimed by them including accreted land and land occupied by them adversely, if any.

To Have And To Hold the premises aforesaid, with all and singular the rights, privileges, appurtenances and immunities thereto belonging or in anywise appertaining, unto the said party of the second part, and its assigns, forever; the said first parties hereby convenanting that they are lawfully seized of an indefeasible estate in fee in the premises herein conveyed; that they have good right to convey the same; that the said premises are free and clear of any incumbrances done or suffered by them or those under whom they claim, and that they will Warrant And Defend the title of the said premises unto the said party of the second part, and its assigns forever, against the [fol. 837] lawful claims and demands of all persons whomsoever.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

W. M. ANDREWS, (Seal)

BERTHA ANDREWS (Seal)

Signed, Sealed and Delivered in Presence of Us:

.....

.....

[fol. 838] Reverse Side Of Warranty Deed:

State of Missouri,
County of St. Charles—ss.:

On this 6th day of January, 1941 before me personally appeared W. M. Andrews and Bertha Andrews, husband and wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at my office in St. Charles, Mo. the day and year first above written.

My term of office as a Notary Public will expire December 16, 1944.

(Seal) ESTELLE J. AMSINGER,
Notary Public.

[fol. 839] Q. Now, Mr. Ewald, will you state the story of the recordation of the deed?

A. After we had received the check, and after we had satisfied ourselves with all of the objections that were pointed out in the Attorney-General's opinion that accompanied the check, I then gave this deed to one of the men in our office, gave him the money to buy the revenue stamps, told him to put the revenue stamps on and record the deed, which was done. The deed was filed for record on January 29, 1941, at 11:15 A. M., and recorded in Book 194, at page 506, in the office of the Recorder of Deeds at St. Charles.

The Court: What date?

Q. What date, Mr. Ewald?
A. Filed on January 29, 1941.

Mr. Watson: I offer in evidence the stamp of the Recorder. I offer the stamp of the Recorder showing that the deed was recorded in Book 194, page 506, of the records of the Recorder's office.

Mr. Blanton: To which offer we want to object for the reasons given to the offer of the deed.

The Court: It will be admitted subject to the objection.

[fol. 840] In The Recorder's Office.

State of Missouri,
County of St. Charles—ss.

I, Harry C. Sullentrop, Recorder of said County, do hereby certify that the within instrument of writing was, on the 29th day of January A. D. 1941, duly filed for record in this office, at 11 o'clock 15 minutes a. M., and is

recorded in the Records of this office, in Book 194 at page 506.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, at St. Charles, Mo. this 11th day of February 1941.

HARRY C. SULLENTROP,
Recorder.

Per ....., Deputy.

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Warranty Deed

Statutory Acknowledgments

From

W. M. Andrews and Bertha Andrews, husband and wife

To

United States of America

Recorded in Book 194, Page 506

Filed for record this 29th day of January A. D. 1941 at 11 o'clock 15 minutes A. M.

HARRY C. SULLENTROP,
Recorder.

Per ..... Deputy.

When recorded deliver to Kansas City Title Insurance Company.

Recorder's Fees, ...$.....

[fol. 841] Mr. Watson: I ask leave of Court for the withdrawal of the offer of Defendants' Exhibit 5, Defendants' Exhibit 4, and Defendants' Exhibit 3, upon substitution of copies thereof.

Mr. O' Bryan: That is a Statutory matter that encumbered this record yesterday all day long. We have a right to withdraw and file certified copies, according to the Statute.

Mr. Watson: That was not my understanding.

Mr. Blanton: It is not mine, either; but I have no objection to your doing so.

Mr. Watson: You have no objection?

Mr. Blanton: No, sir, I have not.

The Court: What is that?

Mr. Watson: Asking leave to withdraw the instruments as soon as copies are submitted therefor.

The Court: Admitted.

Q. This date, the 29th day of January, 1941, was that prior to the time that Mr. Wright came in and got the check? A. Yes, sir.

Q. How many days? A. Oh, approximately ten days.

Q. Ten or eleven days? A. Maybe 12 days.

Mr. Watson: That is all, Mr. Ewald.

Cross-Examination.

By Mr. Blanton:

Mr. Blanton: I think I have just about one question, [fol. 842] Your Honor, and then we can conclude with Mr. Ewald.

Q. Mr. Ewald, I notice in this "Defendants' Exhibit 5", which is the opinion of the Attorney General to the Secretary of War relative to this tract, that the 6th objection listed reads as follows:

"Rights, if any, under the timber contract, noted at item 7 of Schedule B of the certificate." What was done to clear up that timber contract, about which Mr. Andrews gave a little testimony?

A. We procured a Quit Claim Deed, a Release Deed from L. R. Freeman and Fannie Freeman, his wife.

Q. Is that Les V. Freeman?

A. I don't know. It is the party who had the timber contract.

Q. May I see that document, please?

A. Yes, sir. (The U. S. Attorney is handed a paper)

Mr. Blanton: I think that is all.

Mr. S. Watson: That is all.

The Court: Announce a recess until 2 o'clock.

Thereupon, at 12:30 P. M., April 3, 1942, a recess was announced to 2:00 P. M. The proceedings then continued as follows:

Mr. S. Watson: Defendant rests, Your Honor.

(Testimony for Plaintiff.)

Thereupon, the Plaintiff, to further sustain the issues on its behalf, offered and presented the following testimony:

[fol. 843] Mr. Blanton: I would like to offer in evidence the letter from McDowell to Valliant, dated November 20, 1940, in which he forwarded this option involved in this case, which has been marked "Government's Exhibit 874-1. That is the letter from McDowell to Valliant in which he recognized this value as being the reasonable value of the property.

Mr. S. Watson: Object to the offer of that document on the ground the representations as to value are entirely irrelevant and incompetent.

The Court: It will be received subject to the objection.

Mr. Blanton: It is dated November 20, 1940 on the letterhead of R. Newton McDowell, addressed to Col. Valliant:

"Col. R. D. Valliant,
Real Estate Branch,
Office of Quartermaster General,
War Department,
Washington, D. C.

Dear Sir:

"I herewith submit option of William M. Andrews and his wife Bertha L. Andrews for 94.46 acres in Section 26, Township 46, Range 2, for $12,000.

"I recommend its acceptance as a fair value to the United States Government.

Yours very truly,

R. NEWTON McDOWELL."

Stamped received in the War Department November 22, 1940.

[fol. 844] W. R. DALTON of lawful age, produced, sworn and examined, testified on behalf of Plaintiff as follows:

Direct Examination.

By Mr. Blanton:

Q. Mr. Dalton, state your name to the Court, please.

A. W. R. Dalton.

Q. Where do you live, Mr. Dalton?

A. St. Charles.

Q. By profession, I believe you are an attorney?

A. Yes, sir.

Q. I will ask you if you were connected with the liquidation of the bank affairs of the Farmers' Bank of Hamburg and the Bank of Defiance, when they were in charge of the State Finance Commission of the State of Missouri?

A. Yes, sir.

Mr. O'Bryan: Object to the introduction of any evidence with reference to liquidation of any bank in St. Charles County, which might have owned this land, for the reason that any evidence with reference to same is not material in this case. And for the further reason that the District Attorney is precluded from offering evidence as to the value of this land in 1940, or at any other time, for the reason that the value was stated in the option to purchase and set forth in the deed which was accepted by the United States Attorney-General, and which was placed of record by order of the United States Attorney-General.

[fol. 845] The Court: Is that all the objection?

Mr. O'Bryan: It is altogether, Your Honor. I think it is all good, too.

The Court: It will be heard subject to your objection.

Mr. O'Bryan: Thank you.

By Mr. Blanton:

Q. Mr. Dalton, I believe Senator Whitlow was the Special Deputy Finance Commissioner in charge of the liquidation of these two banks? A. He was.

Q. And you assisted him in the handling of those affairs? A. I did.

Q. I will ask you to state to the Court if you negotiated the sale of the property which is involved in this case to Mr. and Mrs. Andrews? A. I did.

Q. I wish you would state what you did in handling these negotiations, please.

A. I don't remember how I got in touch with Mr. Andrews, but in some way I did, and, as the usual course, we made a sale to him. And that is all I can tell you.

Q. The sale you made, was it submitted to the Circuit Court of St. Charles County for approval?

A. Certainly.

Q. Also submitted to the Finance Commission before it was submitted to the Circuit Court? Is that routine? [fol. 846] A. No, sir; I submitted it to Mr. Whitlow, and he petitioned the Circuit Court, and the Circuit Court approved it, and the deed was made and passed.

Q. The value you agreed upon for this property, did you consider was the reasonable market value of the property in its, then, condition?

Mr. O'Bryan: Object to that, the opinion of this witness as to the value of the property. It is presumed a man working for the State of Missouri would have sold it for all he could get for it at the time, anyway.

The Court: Overruled.

A. Yes, sir; I considered it a fair value at that time, as it was; we were practically bound to sell.

Q. How long had these banks been in liquidation, Mr. Dalton?

A. Well, from 1931, I think it was. This sale, I think, was made in the fall of 1934, but I had only been connected with the liquidation of these banks from December, 1933.

Q. But the liquidation, at least the affairs of these two banks, had been turned over to Mr. Cantley, who was then

the Special Finance Commissioner during the administration of President Hoover?

A. I don't remember exactly.

Mr. O'Bryan: Hoover was not over Cantley; that was Governor Caulfield.

Q. I will ask you what improvements were on the [fol. 847] premises at the time you negotiated the sale, Mr. Dalton?

A. The improvmeents were, in my opinion, practically worthless at the time of the sale.

Q. But what did they consist of?

A. There was a house there that the windows were out of, the door was out, the floor was in a very bad state of condition on account of hunters having gone there and, I think, run rabbits under there and pulled the floor up and gotten the rabbits out, and things of that kind; all of the improvements were practically worthless at this time.

Q. I hand you Government's Exhibit No. 3 and ask you if that looks like the house as it was then, except that it has been repaired?

A. As far as I can remember, that looks very much like it.

Q. And I hand you Government's Exhibit No. 4 and ask you if that looks like what has been referred to by Mr. Andrews as the corncrib?

A. There was a building very similar to that. If this is not the building, it was very similar to that at the time we sold it.

Q. Was there a cistern on the place at the time you sold the building, do you recall?

A. There was a place where a cistern had been. Prior to our connection with it, there had been a still there, and some parties had been there and put explosives in this [fol. 848] cistern and I think practically ruined the cistern by blowing up and damaging the walls, and so on.

Mr. Blanton: Take the witness.

Cross-Examination.

By Mr. O'Bryan:

Q. You practiced law how long out in St. Charles County? A. Forty years, "Red."

Q. Did you practice any place except St. Charles?

A. Yes, sir; Troy and Warrenton.
Q. Also at Warrenton? How long?
A. I lived in Wentzville for many years.

The Court: That is far enough. We don't care to go all the way to Moberly.

Mr. O'Bryan: I will get him almost up there.

Q. You were in Wentzville at the time you took over the liquidation of the banks?
A. Yes, sir; but I moved to St. Charles immediately.
Q. This farm had a good reputation when you got hold of it, didn't it?

Mr. Blanton: What do you mean by "reputation?" Reputation for what?

Mr. O'Bryan: It had a reputation.

Mr. Blanton: Object to the form of the question.

Mr. O'Bryan: It was supposed to be in the producing business.

Q. All you know, they told you the cistern had been damaged by an explosion caused by some neighbors going [fol. 849] there at the time of the distillery and blowing it up?
A. I think possibly the house was damaged some on that account, too.
Q. That bank had been under the supervision of—who was Deputy Finance Commissioner in charge of that bank, prior to Sen. Whitlow taking it over?
A. Frank Oberheid at Wright City.
Q. And at the time you sold that the superhighway had not been constructed from St. Louis out across Daniel Boone Bridge into Wentzville, had it?
A. I think not.
Q. And at the time, the Daniel Boone Bridge had not been completed? A. No, sir.
Q. I will ask you if you remember the date that the Daniel Boone Bridge was completed and traffic had been opened through there, and that highway was completed?
A. I went out there the day of the celebration, but I do not know the date.
Q. You were attorney for the HOLC, first?

A. I believe so.

Q. And I came out to see you once in a while?

A. Yes, sir.

Q. Do you remember when we moved from the old Buder Building to the old Post Office?

Mr. Blanton: I don't know what that has to do with this [fol. 850] controversy.

Mr. O'Bryan: I am refreshing his memory.

The Court: You may go ahead.

Q. We moved there on Memorial Day, 1937; do you recall that bridge was opened and that traffic was moving in June, 1937, and thereafter?

A. I can't place any connection.

Q. It was June, [1947]. Reflect a minute about other things and comparisons and see if you do not recall it was in June, 1937?

A. That is too far back for me.

Q. But it wasn't, in 1934, when you sold this?

A. No, sir.

Q. After that bridge was completed and that road opened, was there a greater demand for land out there west of the river than there was before that? of that land in that locality? A. I would say, yes, sir.

Q. And the price of land increased in value and the people held their land at a higher price than they had been holding it prior to the construction of the road, didn't they? A. Oh, yes, sir.

Q. And the completion of that bridge and that road made a material and a decided increase in the values of that land in that whole area? A. I think so.

Q. Now, you know that county out there like a book, do you not?

[fol. 851] A. Very well.

Q. Now, they constructed several farm-to-market roads and WPA roads in that area, didn't they, during 1936 and 1937 and 1938 and 1939?

A. Yes, sir.

Q. You know where this Andrews farm is, of course?

A. Yes, sir.

Q. And when was that gravel road constructed down to it, and the road widened and fence-rows all chopped out?

A. I can't place that date; it was several years, two or three years and maybe four years after we sold the property.

Mr. O'Bryan: I believe that is all.

Mr. Blanton: That is all, Mr. Dalton.

Mr. Blanton: I would now like to have the records of the Circuit Court out there, passing on this matter, marked "Government's Exhibit No. 7."

Mr. Blanton: I would like to offer in evidence Government's Exhibits 5 and 7, Five being the Commissioners' deed to this property, and Exhibit 7 being the certified copy of the Circuit Court records relative thereto.

Mr. S. Watson: If the Court please, I object to the offer of either of these exhibits on the ground that they pertain to a sale that was made in the process of the liquidation of the bank, the witness having testified, with reference to [fol. 852] that sale, that they had to sell the land, and the sale being entirely inadmissible and not going to the matter of the value of the land.

Mr. Blanton: I am offering the deed and also the Circuit Court proceedings authorizing execution of the deed.

The Court: It may be submitted.

Mr. Blanton: Without burdening Your Honor with listening to the entire deed setting forth the proceedings in the handling of the two banks which seem to have owned this property jointly, then setting forth: "Whereas, on the 29th day of August, 1934, the Court by order duly made and entered authorized and directed said Commissioner of Finance to sell the real estate hereinafter described to W. M. Andrews and Bertha Andrews, husband and wife, as tenants by the entirety, for the consideration of $1750," and authorized the execution of the deed, and so forth. And it describes the land involved in this suit. It is executed by the Farmers Bank of Hamburg and the Bank of Defiance by O. H. Moberly, Commissioner of Finance, and acknowledged before Ethel Hagener; and recorded in Book 179, page 426, of the deed records of St. Charles County; certified to by Mr. Sullentrop, the Recorder.

[Ane] Government's Exhibit 7 is the Circuit Court proceedings approving the sale and authorizing execution of the deed, showing that in vacation, on August 29, 1934, the proceedings were held before the Circuit Court, and those proceedings show that the sale was authorized at the price and sum of $1750 by the entirety. And these records are certified to by Earl R. Stone, Clerk of the Circuit Court, [fol. 853] St. Charles County, Missouri, by Marvin G. Rinkin, Deputy Circuit Clerk.

(Here insert U. S. Exhibits "5" and "7")

The original exhibits are filed with the Clerk of the Court, but summaries follow:

[fol. 854] Summary of Government Exhibit 5.

This exhibit is a Commissioner's Deed executed by the Commissioner of Finance of the State of Missouri, charged with the liquidation of the Farmers Bank of Hamburg, Hamburg, Missouri, and the Bank of Defiance, Defiance, Missouri, conveying the interest of those two banks, as owners of the property condemned in this case, to W. M. Andrews and Bertha Andrews as tenants by the entirety, for a consideration of $1,750.00, which deed was executed by O. H. Moberly, as Commissioner of Finance of the State of Missouri, in behalf of the two aforementioned banks, which the said Finance Commissioner was liquidating; and which said deed was acknowledged on September 4, 1934 by said Finance Commissioner and duly recorded in the office of the Recorder of Deeds on September 15, 1934, and had attached thereto $2.00 worth of Internal Revenue stamps duly cancelled.

This deed also contained a clause to the effect that the Finance Commissioner had been authorized by the Circuit Court of St. Charles County to sell the real estate therein described and herein condemned, and had also authorized and directed the execution of the deed to W. M. Andrews and Bertha Andrews for the named consideration of $1,750.00.

[fol. 855] Summary of Government Exhibit 7.

This exhibit is a certified copy of certain proceedings in the Circuit Court of St. Charles County, Missouri, in connection with the sale of the property involved in this condemnation suit by O. H. Moberly, Commissioner of Finance of the State of Missouri, charged with the liquidation of the affairs of the then owners of the land condemned in this suit, to-wit, the Farmers Bank of Hamburg, and the Bank of Defiance.

This exhibit shows that on August 29, 1934, O. H. Moberly, Commissioner of Finance, was engaged in liquidating the affairs of the Farmers Bank of Hamburg and of the Bank of Defiance. Among other assets of said two banks in liquidation was the property condemned in this case; and that one W. B. Whitlow was a Special Deputy Commissioner of Finance in charge of the liquidation of said two banks, and that the said W. B. Whitlow recommended to the Court that it would be to the best interest of the depositors, creditors and stockholders of said banks to sell said land for $1,750.00 cash at private sale; and that said petition so filed in the Circuit Court on August 29, 1934 was duly verified by the said W. B. Whitlow before a notary public on that date.

[fol. 856] Said United States exhibit 7 further contains a certified copy of the order of the judge of the Circuit Court of St. Charles County, Missouri, in vacation, dated August 29, 1934 which recites the filing of the petition of Whitlow asking for the sale of the property herein condemned and for the sum of $1,750.00, and states that the Court having seen and read said petition and application, and having heard the evidence in the case adduced found that it was to the best interest of the two banks, their depositors, creditors and stockholders to sell said real estate and for the sum of $1,750.00 in cash, and further authorized the execution of the deed by the Commissioner of Finance to the property herein condemned in the sum of $1,750.00 in cash.

Said exhibit further discloses that on said 29th day of August, 1934, said W. B. Whitlow, as Special Deputy Finance Commissioner, reported the sale of the property to

W. M. Andrews and Bertha Andrews, as tenants by the entirety, for said sum of $1,750.00.

Said exhibit further shows that on said date the judge of the Circuit Court of St. Charles County, in vacation, authorized and directed O. H. Moberly, Commissioner of Finance, of the State of Missouri, to execute the necessary deeds and conveyances to convey the title of the real estate condemned herein to the said W. M. Andrews and Bertha Andrews, as tenants by the entirety.

[fol. 857] W. R. Dalton, previously sworn, recalled by defendants for further examination, testified as follows:

Questions By Mr. O'Bryan:

Q. Mr. Dalton, has there been any increase in the values of real estate out there in that locality since the construction or completion of this bridge and highway?

Mr. Blanton: He has already answered that once, Mr. O'Bryan.

Mr. O'Bryan: He said, "Yes?"

Mr. Blanton: Yes, sir.

Q. I will ask you what in your opinion the percentage of increase has been in the value of the property.

Mr. Blanton: I think that is a highly speculative question, and what property might have generally increased depends on its location and proximity to the bridge. We object to it.

The Court: Let him determine, first, whether he knows.

Mr. O'Bryan: I asked him a while ago if there had not been, and he said there was, and Mr. Blanton agreed.

Mr. Blanton: He said it had increased in value; that is what he testified to.

Q. Do you know what percentage it has increased, Mr. Dalton?

Mr. Blanton: Object to that form of the question.

The Court: Let's see what the witness says. Do not answer except whether you know the percentage.

A. I can only say my views of what it has increased.

[fol. 858] The Court: I do not want you to answer what percentage you think it has increased, but do you have any knowledge of just what percentage of increase it has been?

Mr. Blanton: Of this particular tract.

A. All I could say is, generally.

The Court: I do not want you to give the percentage.

A. I will not. All I can say is that lands generally over the western part of the county, that I am familiar with, have all increased in values, and I have my idea of a percentage, but that is all I can give you.

The Court: Generally through that section?

A. Yes, sir.

By Mr. O'Bryan:

Q. You have noticed the sales of property in that locality and also the records of these sales and what the increase has been in values over former sale values there as well as values that have transpired in the last two or three years, have you not?

A. Oh, I have handled land and bought and sold land in the western part of this county, and acted as agent for all these years that I have been at Wentzville. I bought and sold land in the last few years, and bought and sold land for thirty odd years.

Q. What in your opinion has been the increase in percentage of the land in this area down there?

Mr. Blanton: Object to the increase in percentage of [fol. 859] the land in the area. We are not trying the land in the area. It is all classes of land and different kinds and different circumstances.

The Court: Objection sustained.

Q. Well, this Andrews tract, then.

The Court: He has asked you now about the Andrews tract.

Q. What would be your answer as to the increase of the value of the Andrews tract?

The Court: Over what period of time?

Mr. O'Bryan: From the time he sold it until 1940, November.

Mr. Blanton: Have you seen the Andrews tract since you sold it?

A. I don't think so.

Mr. Blanton: Object to it for that reason, then; he has not even seen the premises for six years.

The Court: Overruled.

Mr. Blanton: Note our exception.

Mr. O'Bryan: What would you say?

A. Well, I think several hundred per cent increase since that; I would say anywhere from—

The Court: Up to what time?

A. Present time.

The Court: Sustained.

Mr. O'Bryan: Well, November, 1940?

Mr. Blanton: Leaving out of it the construction of the [fol. 860] TNT plant.

Mr. O'Bryan: I am not going into the TNT.

Mr. Blanton: I want him to understand what the question is.

Mr. O'Bryan: He does; and is a good lawyer, too.

Mr. Blanton: Object to the form of the question in which it is asked, too.

The Court: Objection sustained.

Mr. Blanton: I want to ask that the answer be stricken.

The Court: Sustained.

Q. What would you say the increase in value, if any, of the value of this property would be from the time you sold it for the State Finance Department in 1934, to November, 1940, after the construction of the Daniel Boone

Bridge and the highway out to Wentzville. Do you think you are acquainted with that increase during that period of time, Mr. Dalton?

A. I would consider that farm in connection with the other values of land that I am familiar with, that would be an increase.

Mr. Blanton: Just a moment. Object to that for the further reason there is incorporated in his answer something the Court has already ruled out.

The Court: Sustained.

Mr. O'Bryan: We offer to prove by this witness that that property has increased 500% in value.

Q. What would you say would be the percentage in in-
[fol. 861] crease in value of that land from the time you sold it until November, 1940?

Mr. Blanton: To which we object unless the question is framed to eliminate therefrom any increased value which might arise as a result of the TNT project.

Mr. O'Bryan: That is proper for cross-examination.

Mr. Blanton: No, sir, it is not.

The Court: Reframe that.

Mr. O'Bryan: Do not take into consideration the fact the TNT plant went there.

A. I would say 300 per cent.

Mr. O'Bryan: That is all.

By Mr. Blanton:

Q. What makes it worth three times what it was when you sold it?

A. Well, from 1934 there was an increase of at least 100% on almost all of that land, in the western part of the county.

Q. I am not asking you about all the land, I am asking you about the particular tract which you say you never even saw from the time you sold it until 1940.

A. That land was sold at a forced sale.

Q. Didn't you testify you got all it was worth?

A. I got all I thought it was worth.

Q. Didn't you have an offer of $1600 and thought you were going to lose the sale because you had not accepted the $1600?

[fol. 862] A. That is true.

Q. All right; go ahead, give more reasons if you have any.

A. And that particular piece of property having been sold at practically a forced sale, I think it would be 300% on that particular tract.

Q. What was there forced about it?

A. The Department at Jefferson City was directing us to close out our real estate holdings.

Q. When did you close out that estate?

A. I don't remember the exact date.

Q. About when? A. 1937.

Q. In other words, you kept that estate open for three years after you made this sale, didn't you? A. Yes, sir.

Q. And you remained on the payroll during that period of time, didn't you? A. I sure did.

Q. So that there was not anything forced about it, was there?

A. Only that the Department at Jefferson City was directing us; we had to show a certain amount of turn-over.

Q. You didn't recommend a sale you didn't think was the fair value of the property, did you?

A. I did not. At that time, it was a fair value.

[fol. 863] Q. And you think because of the fact that you sold that for the Bank after you had thought it was a fair value, and after the fair value had been approved by the Circuit Court of St. Charles County, with that in mind, you still think you sold it for just a third of its value?

A. No, sir; in the fall of 1934, that was practically all it was worth?

The Court: You sold it for $1750?

A. Yes, sir.

The Court: And you think in 1940 it was worth—

Mr. Blanton: Three times that.

Q. Did it grow any more crops?

A. No, sir; it hadn't been cropped in 1934.

Q. Did it produce any more taxes for the county?

A. No, sir.

Q. Were there any homes erected on the premises except this property that has been described by both Mr. Andrews and yourself?

A. The building of 61 and the building of that road by the place, was a large factor in increasing its value.

Q. It had a good all-weather road when you sold it, did it not? A. No, sir.

Q. How many roads went by the place when you sold it?

[fol. 864] A. The same roads were there then; those are the same roads there now.

Q. Were they not all gravel or all-weather roads?

A. All, except they were one track.

Q. That is all anybody could travel on at a time?

A. Yes, sir; but sometimes you met somebody on the road.

Mr. Blanton: I think that is all.

JOHN CARMODY, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. Blanton:

Q. State your name to the Court.

A. John Carmody.

Q. By whom are you employed?

A. By the Real Estate Branch of the War Department.

Q. Where is your post of duty?

A. Well, it is at Omaha, right now.

Q. What title with the Real Estate Branch do you hold?

A. I was manager on different projects, supervisor of projects.

Q. Was the Weldon Springs project one of your projects? A. Not to begin with.

Q. I know, not to begin with, but after these options were repudiated?

[fol. 865] A. I came to Weldon Springs the 1st day of May, 1941.

Q. After you came to Weldon Springs, did you contact Mr. Andrews, the witness who was on the stand this morning?

A. Mr. Andrews came to my office, the real estate office at the Weldon Springs area.

Q. Did you have a conversation with him about the improvements that had been erected on these farms, after he purchased them, through Mr. Dalton, from these two banks? A. Yes, sir.

Q. I will ask you if he made a statement to you as to how much money he had spent in repairing these buildings?

Mr. O'Bryan: Object to all this line of testimony for the reasons heretofore assigned.

The Court: It will be heard subject to the objection.

A. He did.

Q. What amount did he give you in that conversation in your real estate office of the expense of repairing these buildings?

A. Two hundred dollars.

Mr. Blanton: Take the witness.

Cross-Examination.

By Mr. O'Bryan:

Q. What did you say your name is?

A. John Carmody.

Q. Where do you live now? A. Omaha, Nebraska.

[fol. 866] Q. Who are you employed by?

A. Real Estate Branch of the War Department.

Q. How long have you been employed by the Real Estate Branch of the War Department?

A. Just about a year, April, 1940.

Q. Where did you reside before they employed you?

A. For six years previous I resided in Washington.

Q. What were you doing there?

A. I was with the Farm Security Administration.

Q. And before that?

A I was at Omaha, Nebraska.

The Court: I don't understand the purpose of taking up this time of the Court.

Mr. O'Bryan: I do not like to, but this happens to be a witness that has not been here before.

Q. How many of these people out in that area did you contact last summer or last spring, May and June, at-

tempting to get them to withdraw their answers in this case and settle with you?

Mr. Blanton: Object to the form of the question.

The Court: Sustained.

Mr. Blanton: Even a "Country Jake," as he calls himself, ought to know better than to form a question like it.

Q. Did you go out to Weldon Springs for the War Department—for what purpose?

A. I was sent out there for the purpose of acquiring 8 or 9 tracts of land that were being added and which op-
[fol. 867] tions had not been accepted on, and to endeavor to make settlements with a number of owners that had accepted options.

Q. Did you talk to Mr. Andrews? A. Yes, sir.

Q. Did you go to him and talk to him?

A. No, sir; he came to my office.

Q. He came to your office and talked to you? When?

A. About the 24th of May, 1941.

Q. What was the reason he came?

A. In response to a letter I think that I sent out to all of them, suggesting they come in and talk over the problem.

Q. You wrote a letter to all of the parties that owned land in that area who had pending in this Court condemnation proceedings against them?

A. I don't think that I wrote letters to all of them.

Q. But you did write one to Andrews? A. Yes, sir.

Q. At that time, the condemnation suit had been filed in this Court by the United States District Attorney? You knew that, didn't you? A. I think so.

Q. You also knew that an answer had been filed on behalf of Mr. Andrews by an attorney, and that he had an attorney helping him in that lawsuit in this Court?

A. No, sir; I didn't.

[fol. 868] Q. Did you talk to the United States District Attorney about it?

A. No, sir; I think not.

Q. You didn't write these letters with the consent and advice of the United States District Attorney?

A. I don't think I asked him anything about it.

Q. Who instructed you to come out here and write letters to these people?

Mr. Blanton: I think in fairness to you that the record shows, even as late as June, your associate counsel requested further time in which to plead. There had not been any pleading filed as late as in June, 1941.

Mr. O'Bryan: If the Court please, I will accept that suggestion, but it doesn't announce to this Court that Mr. Andrews had an attorney, and here is a proceeding attempted to be compromised of litigation that was within the realms of this Court, by someone other than the attorneys connected with the case, and I think that might have some bearing on this witness and what his purposes were in being at Weldon Springs, and I think we should be allowed to cross-examine him for that purpose.

The Court: Very well.

Q. You are not an attorney at law? A. No, sir.

Q. You never practiced law? A. No, sir.

[fol. 869] Q. You have never been connected with these cases except in the capacity of attempting to make settlement on behalf of the War Department?

A. That is right.

Q. And you were trying to purchase this land from these people? A. That is right.

Q. And the War Department sent you out here for the specific purpose of purchasing this land from the owners and from the former owners whom they had not paid off?

A. And to acquire this additional land.

Q. Did you know in this instance that a deed had been recorded to the United States of America, selling this land to the United States, and that deed was of record at the time?

Mr. Blanton: I want to interpose an objection at this time for two reasons: In the first place, I do not think it makes any difference whether he did or not; and, in the second place, I didn't go into these matters on direct examination, and I object for that reason.

Mr. O'Bryan: This is not a criminal case, Your Honor.

Mr. Blanton: The rules of evidence apply just the same.

The Court: The rules of evidence apply in civil cases? All right.

(The last preceding question is read to the witness)

A. No, sir, I did not.

Mr. O'Bryan: That is all.

[fol. 870] Redirect Examination.

By Mr. Blanton:

Q. You did succeed in renegotiating about 20 or 25 of these parcels, didn't you Mr. Carmody?

A. Yes, sir; I did.

Mr. Blanton: That is all.

Mr. D. Watson: Government's Exhibit No. 12. It is agreed by Counsel that ths same exhibit, which was introduced in the Callaway case, is a map a copy of which is on file in the Farm Bureau office at St. Charles, and that it is an aerial map of a part of the Weldon Springs area, and has on it the photograph of the farm in suit here, and that farm is indicated on this map by the figure "2" written on the farm and surrounded by a yellow or red mark around the farm. Is that it?

Mr. S. Watson: As I understand the agreement, Mr. Watson, I am waiving the necessity of identification of this map?

Mr. D. Watson: Yes, sir.

Mr. S. Watson: And I am making other objections to the introduction in evidence, but I am waiving the necessity of identification.

Mr. D. Watson: And you are admitting this farm is designated on this map as No. 2, as stated a moment ago?

Mr. S. Watson: Yes, sir, I admit that. I do not want to be [undertood] to admit that this is exactly an accurate

designation of the farm, although I do not know that it [fol. 871] is not. I am making that particular admission.

Mr. D. Watson: We offer this as an exhibit.

United States Exhibit 12 is an aerial map of a portion of the Weldon Spring Area and is on file with the Clerk of the Circuit Court of Appeals.

[fol. 872] Mr. Blanton: This shows the outline, Your Honor. (Referring to a different plat)

Mr. S. Watson: I do not object to making the same agreement concerning that as the exhibit just offered.

Mr. D. Watson: Mr. Watson, you have stated the same agreement applies to this map, which is now marked "U. S. Exhibit 6," as the other one?

Mr. S. Watson: Yes, sir.

Mr. D. Watson: We offer this in evidence, too, Your Honor.

Mr. S. Watson: Object to both offers, however, on the ground that the matter of land value is not an issue in this proceeding, and the purpose of offering them is to establish land value.

The Court: Overruled.

United States Exhibit 6 is an outline map of the tract involved, the original of which is on file with the Clerk of the Circuit Court of Appeals.

[fol. 873] Scott Meyer, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Q. Your name is Scott Meyer, you reside in Hannibal, Marion County, Missouri, and have lived there ever since you were three years old? A. That is correct.

Q. You are in business there in the real estate business, are you not, Mr. Meyer? Maintain an office?

A. That is correct.
Q. How many farms do you own? A. Nine.
Q. About 2500 acres of land?
A. Something like that.
Q. You operate personally how many of these farms?
A. Four.
Q. Where are those farms located?

The Court: This gentleman testified yesterday in the other case.

Mr. Blanton: I was about to ask Mr. Watson if we cannot stipulate that our appraisers, their qualifications established yesterday may be used and considered in this case.

Mr. S. Watson: I am willing to stipulate that, subject to the objections made to the qualifications yesterday?

[fol. 874] Mr. D. Watson: All right.

Q. (Mr. D. Watson) Mr. Meyer, I will ask you if you made an inspection of the Andrews tract here in controversy? A. Yes, I did.
Q. When was that?
A. First day of December, 1941.
Q. Tell the Court what you did, and when you went out and looked at that farm?
A. I drove around it.

The Court: 1941?

A. Yes, sir, the first of December, this past fall. I drove around it on three sides where a road encompassed the farm, and also drove across the farm where a new road cut it about in half, and then I walked the farm to observe its physical aspects.
Q. You went all over it and saw it all, you say?
A. That is right.
Q. How much of the farm was in woods, approximately?
A. About 30 acres is my best guess on it, Mr. Watson. There were three or four areas that had timber on them, but my best judgment is there were about 30 acres.
Q. Referring to Government's Exhibit 6, the parts of this farm marked in green, is that a fair illustration of the part that was in the woods?

A. Yes; except that the part towards the west seems to me to have been a larger area than that, and the part towards the north seems to have been smaller than that.

[fol. 875] The Court: Is that hill or prairie land?

A. It is upland.

Q. (Mr. Watson) No creek bottom on this at all?

A. No, sir.

The Court: No big ravines?

A. The part that is in white, most of that had been in cultivation for some time, as I now recall it, and the center part was fairly smooth. Some of the outsides were pretty broken and eroded.

Q. Were there fences on the farm?

A. I viewed it after the working area had started, and the fence had been removed.

Q. I hand you a picture marked 874, and also marked "U. S. Exhibit 3;" look at that, will you?

A. That is a picture of the house that had been there, I was told by those who knew it; but it had been removed at the time I viewed the place.

Mr. O'Bryan: Object, and ask that be stricken out because the house was not there and the fence was not there, or anything, and he never saw the house in his life; he just said so.

The Court: Overruled.

Mr. O'Bryan: It was not there in the condition it was in, in January, 1941, when this deed was recorded.

Q. I hand you Government's Exhibit 4, also.

A. That is a picture of the granary and cornerib that were represented to me to have been there, and on which [fol. 876] I predicated my ideas of value.

Q. You took into consideration that these two buildings were on the farm, in making up your valuation of the farm?

A. Yes, sir, because there were none there at the time I viewed the farm.

Q. Was there any evidence of any alfalfa or clover crops on the farm, outside of some lespedeza? I understand there was some lespedeza.

A. No hay crops other than lespedeza. I believe a part of the cultivated land was in a stand of lespedeza.

Q. Was there any of it in any kind of crops?

A. No tended crops, although, as I recall, wheat had been in the narrow portion down towards the southern extremity of the place, and I believe also there was evidence of wheat stubble in the 7-acre cultivated area at the extreme northwest portion of the farm. I believe that is true; that is my recollection.

Q. This farm is how far from the nearest village or town?

A. I think it was about two miles north of Howell, almost straight north.

Q. Is that the nearest village?

A. Yes, sir; I think so.

Q. There were probably 50 or 100 people there?

A. Well, Howell, again, was the center of the construction area when I was there, but I did try to post myself as to the size that it had been by looking at the State highway maps. As I recall, it was a bigger village [fol. 877] than that.

Q. About how big?

A. My recollection, something like 350 people.

Q. That was the town of Howell? Anyway, that was the nearest town?

A. Yes, sir; that is true.

Q. How far is this farm from the Missouri River?

A. Approximately, I would say about seven miles. I didn't measure it.

Q. North of it? A. Yes, sir.

Q. And a lot of hilly land in between this farm and the river? A. That is true.

Q. I believe you stated there is no river bottom or creek bottom land on the farm?

A. No, sir: it is all level.

Q. How far is this farm from the State highways No. 40 or 61?

A. My best judgment, about two miles west.

Q. Do you know how the roads are into and out of there? Which way did you go when you went into it, off of the highway?

A. I went north from Howell to it, and of course, then, I went north from there to the Callaway place, that we

spoke of yesterday, and I was over quite a few of the roads, and the roads that had been destroyed by the Government were good gravel roads, and if I remember rightly, [fol. 878] the road on the east side of the place is better than the average gravel road.

Would you say the main road from the highway to this farm would be through Howell?

A. Yes, sir.

Q. That would be how far from the highway through Howell to this place?

A. I should think five or five and a half miles, Mr. Watson.

Q. Did you take into consideration, of course, the location of the place with reference to surroundings, cities, as well as other things? St. Louis being 30 miles from it?

A. Yes, sir.

Q. What do you say about the general neighborhood up there, Mr. Meyer?

A. It was kind of a secondary general farming neighborhood.

Q. What about the improvements of the surroundings close to there?

A. Most of the improvements were showing need of repair and a lack of prosperity, in my opinion.

[A.] Now, this wooded land—

The Court: You mean on this particular place?

A. No, sir; I thought the question was about the general community.

Q. On this timberland, quite a lot of that was cut over, just stumps, wasn't it?

A. Well, the major acreage of timber was second-[fol. 879] growth timber, scrubby; but right west of the house, that is to the rear of the house, or I took it to be the rear, it was at least west, was an area where there had been some bigger timber. The major part of that had been removed, but it seems to have been removed fairly recently—that is, I mean in the last year or two, and I took it into consideration as having value other than that it was scrub timber.

Q. There was no salable timber on there when you looked at it or was there?

A. There was a little salable timber to the west of the house; I judge that area in there was 7 or 8 acres, all told, just an offhanded guess; it wasn't a great deal.

Q. What in your opinion was the fair market value of that farm as of about the 1st of November, 1940?

Mr. O'Bryan: Object to the answer to this question for the reason that any answer that the witness makes he will have to base upon an inspection that he made in December, 1941. That he would have to make upon the evidence here is, that this had been taken charge of more than a year previous by the War Department. It has already been testified the village was destroyed—the town of Howell was destroyed; that the roads were being used for a year by the War Department and the Ordnance Department; and we, therefore, object to him forming an opinion as to the value of this ground at the time of the taking in 1940 because he was not acquainted with the conditions [fol. 880] and is not acquainted with the value of the property.

The Court: Objection overruled.

A. $2300.00.

Q. I will ask you another question, Mr. Meyer: Did you find on the place there any undesirable growth—wild onions or sorrel, or things of that sort?

A. It was pretty badly infested with both wild onions and wild sorrel; that is, the lespedeza portion.

Q. Tell the Court why these are a bad thing to have on a farm.

A. Well, getting to the wild onions, they seriously flavor the wheat and they are very objectionable in a pasture because they flavor the milk. Wheat that has the flavor of wild onions is "docked" several cents a bushel, and they are very hard to get rid of; and that place is pretty badly infested with wild onions.

Q. You are in the dairy business?

A. That is true, and I can't use that kind of land at all. As regards the red sorrel, that is a low-growing meadow weed and is also pretty hard to get rid of. I object to them both. I think they have an influence on the value of any farm.

Q. What do you say about the farm as to its fertility?

A. I would have to base that upon my judgment of the soil. I had a very good opportunity to observe the character and depth and color of the soil because of a new road that had been cut east and west across the place, [fol. 881] about midway north to south. This had been put where the place jogs. The Government had also done some grading along the north side of the place, and I observed the depth and color and character of the soil and the subsoil there. I had a very good opportunity, probably better than if work hadn't been in progress.

Q. And you say it was of rather low fertility? is that it?

A. Yes, sir; I think it would be below average fertility.

Q. What do you say about it with reference to erosion or being washed off?

A. Well, pretty well down through the center of the unshaded portion of your map there, the soil showed its maximum depth, but along the edges a good deal of the top soil had been lost, and there were places where the subsoil alone was showing. I would say about half of it had not suffered serious erosion, and the other half had suffered fairly serious erosion in loss of soil.

Q. When a farm will not raise red or sweet clover or alfalfa, they usually put it in lespedeza, don't they, if they want to get some kind of a grass crop on it?

A. Well, lespedeza is a very acid tolerant plant that will grow without lime, and it does benefit the land. It will grow where any other legume that I know of will grow.

Q. Will you say that was rather an acid farm?

[fol. 882] A. I judge so; there was quite a little tickle grass there.

Q. Now, you can tell by the kind of vegetation growing on ground whether it is sweet land or whether acid, can you?

A. Yes, sir; certain plants tell you that.

Q. You would say this is acid? A. On the sour side.

Q. Did you state what in your opinion was the fair market value of the farm? I asked you that question and an objection was made.

A. $2300.

Mr. D. Watson: That is all.

Cross-Examination.

By Mr. O'Bryan:

Q. You never laid eyes on this farm until December, 1941? A. That is true.

Q. And you never went out there and analyzed that soil as it would be analyzed by people in the employ of the Agricultural Department, or the Farm Bureau, or the Missouri University? You just went and looked?

A. Yes, sir; I just looked at it.

Q. How many places did you look at out there for the Government, when you were out there?

A. I think I looked over nineteen.

Q. You were asked to examine 19 of them?

A. That is true.

[fol. 883] Q. And you have been employed by the Government to make those inspections and to testify in this case and other cases for that purpose? You went there for the purpose of testifying?

A. Yes, sir.

Q. There was not any fence on it when you saw it; you could not tell the state of repair? And there was not any house on it, was there?

A. No, sir.

Q. And the Government had been using it for a year, and cutting new roads, and everything, before you looked at it? Hadn't they?

A. I don't know how long they had cut roads. I don't think they had cut them that long; it looked like fairly recent. I looked at the land in substantially its original condition, other than the fence.

Q. But you had to draw conclusions from what you saw at that time?

A. Those are the things on which I based my value.

Q. So you could qualify as a witness in this case to testify? A. Yes, sir.

Q. And you didn't own any ground of this kind in Adams County, Illinois? A. No, sir.

Q. They haven't got any ground of this kind around [fol. 884] Hannibal either?

A. Well, if you go far enough.

Mr. O'Bryan: There might be up in Lewis County, a few points up there, might there not?

(No audible reply)

Q. Did you take into consideration in establishing this value, did you take into consideration the fact this Daniel Boone Bridge had been built and the road had been built through there?

A. I took into consideration it was there, yes, sir, of course.

Q. Did that add anything to the value of this ground, as far as you are concerned? A. Yes, sir.

Q. What would that ground have been worth in your estimation if there hadn't been any Daniel Boone Bridge there? and had not been any No. 40 highway out to Wentzville?

Mr. Blanton: Asking him what it would have been under conditions which do not exist is purely speculative, and we object to it.

The Court: Sustained.

Mr. O'Bryan: I have tried to be consistent, but the District Attorney is blowing hot and cold in this case and he does a lot of testifying, and I want to do a little myself.

The Court: Are you going to proceed? The Court has ruled on that. Pass on to something else.

[fol. 885] Q. Mr. Meyer, will you state to the Court whether or not that a gravel road, farm-to-market road, might have any value in increasing the value of a farm, in your estimation? Would the fact that there was a deep well on a farm, agricultural farm, would that increase the value of the property, and would a living spring increase the value of the farm when you viewed it to testify?

A. It would be an item of value, yes, sir, that I would take into consideration.

Q. Did you see the well there?

A. No, sir, I didn't. May I explain myself?

The Court: Sure.

A. The work in the area had been under way, and the house had been removed, and in walking over the farm, while I did walk it carefully, I didn't see the well, and I, therefore, increased my idea of value today when I heard that well was there, because I had not assigned any value

to the well, not knowing there was one there. When I found out there was I took that into consideration, and when I say $2300.00 that was in view of the fact I now know there was a well there.

Q. You know there was a well there? A. Yes, sir.

Q. How many days did you spend out there in that area? A. A total of six.

Q. You spent six days and you viewed 19 properties?

A. Yes, sir.

[fol. 886] Q. And how many hours a day did you put in there, in viewing that property?

A. From about 9 o'clock in the morning until as late as we could go.

Q. How many of you were out there? A. Just myself.

Q. No one but you? A. That was all.

Q. Did anybody go along to show you where the line was?

A. I had to have a Government car take me.

Q. You had to have a Government car take you?

A. Yes, sir.

Q. Someone connected with the attorney's office or the engineers' office, or the ordnance office? or what part of the Government was he connected with?

A. A gentleman in Mr. Guest's office. Mr. Guest is in the Land Acquisition office, and a man in the office that I do not see here today, took me.

Q. He was the one that drove you around where this was? A. Yes, sir; but I did the walking.

Mr. O'Bryan: I believe that is all.

Redirect Examination.

By Mr. D. Watson:

Q. Mr. Meyer, what would you say with respect to this farm as to its being adequately—having adequate buildings on it, for a person that was aiming to farm it as a farm unit?

[fol. 887] A. I thought those buildings were probably adequate for the purpose Mr. Andrews expressed this morning, but they would not be—

Q. What do you mean "for the purpose he expressed?"

A. As I gathered from his testimony, he had it as kind of a week-end place of refuge, but to a farmer it wouldn't

be. There is not enough there to attract a good tenant or attract a good buyer, in my opinion. That is, I mean a resident tenant.

Q. What would you say about the farm having too much or too small an amount of timber with reference to the size of the farm?

A. It had quite a lot of scrub timber on it, probably a great deal more than had any practical value from a post or woodlot standpoint; I think about 30 acres, all told.

Q. I hand you the Government map here of this farm, the part marked with a 2, taken in 1937. Viewing that as its, then, condition, what do you say would be in your judgment the acreage in brush or timber?

A. Just about a third of the total amount, about 30 acres and 60, I would say.

Mr. D. Watson. All right, I believe that is all.

Mr. O'Bryan: We move to strike the evidence of Mr. Meyer out; first, because it is practically all based on hearsay; and, second, it is based upon presumption; that he has not fixed the price of the land from knowledge at the time of the taking.

[fol. 888] The Court: Overruled.

C. S. Cardwell, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Q. State your name to the Court, please.

A. C. S. Cardwell.

Q. Your name is C. S. Cardwell? A. It is.

Q. You live at New Florence? A. That is true.

Q. In Warren County, Missouri?

A. Montgomery County.

Mr. Watson: Excuse me.

[A.] You testified in the Callaway case yesterday?

A. I did.

Q. Mr. Cardwell, I will ask you if you have inspected the farm here in controversy, the Andrews farm?

A. I did.

Q. When? A. On the 13th day of November, 1941.

Q. November? A. November.

Q. Mr. Cardwell, you went out there at the request of the Government, and were paid for going?

A. I did.

Q. And in doing this work? [—] Yes.

[fol. 889] Q. And also for testifying? A. Yes, sir.

Q. Tell the Court what you did when you went out to this farm and looked it over?

A. Starting in on the north end, I walked over the fields of the farm, and also rode around the three sides on which there are roads.

Q. And what did you observe? How many acres of the farm would you say were in woods or brush, or stumps?

A. Well, in my opinion, there were about 20 acres in timber.

Q. What was the other part of the farm in?

A. Well, part of it had been in cultivation and the rest in lespedeza and grass.

Q. What would you say as to the character of the soil or land?

A. Well, there were a few acres of fairly good upland soil, and some of it was not so good.

Q. It would be what you would call a whiteoak ridge farm?

A. No, sir; it wasn't the whiteoak type of land. I believe the soil map classes that farm as putnam type, which is fairly good upland soil. There was a good deal of whiteoak timber on that, but what we know as whiteoak land is white land, and this was sort of reddish colored soil.

Q. What character did you say? what character of soil was it?

[fol. 890] A. Putnam is the designation.

Q. Did you take into consideration, in arriving at your value of it, these two pictures that have been introduced here in evidence? A. Yes, sir; I did.

Q. You took into consideration the locality of the farm, and the neighborhood it was in, and the character of the neighborhood? A. Yes, I did.

Q. And the locality with reference to the distance from towns, and schools, and churches? A. Yes, sir, I did.

Q. And roads? A. Yes, sir.

Q. What would you say was the fair market value of that farm as of about November, 1940?

A. $2990.00.

Mr. D. Watson: I believe that is all.

Cross-Examination.

By Mr. S. Watson:

Q. How did you arrive at the $2990, Mr. Cardwell?

A. I figured that a man operating that farm would capitalize his land at so much, and he would get about a certain amount of productivity off of a farm of that type, and considering the amount of overhead, I figured that would be a reasonable amount of overhead for that type of farm.

[fol. 891] Q. Also basing it on just what estimate you could make there as to the productivity from an agricultural standpoint? A. That is right.

Q. Now, in that connection, did you compare it with any land of your own?

A. Well not particularly. There is a great deal of land in Northeast Missouri that is similar in character.

Mr. S. Watson: I think that is all.

Mr. D. Watson: That is all, Mr. Cardwell.

Mr. O'Bryan: I move to strike out the evidence of this witness for the reason he testified he didn't see the property until November 13, 1941, a year after it had been taken by the Government.

The Court: Overruled.

Mr. O'Bryan: I have to make that motion anyway, no matter how you are going to rule; but do you consider that I make it for everyone?

Mr. Blanton: That will be agreeable, I think.

The Court: It will be agreeable to the Court, too.

ROSCOE MURPHY of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Q. Mr. Murphy, state your full name, residence and [fol. 892] occupation.

A. Roscoe Murphy, St. Clair, Missouri.

Q. You testified yesterday in the Callaway case?

A. I did.

Q. I will ask you if you, at the request of the Government, and being paid by the Government to go out and examine this farm and tell the Court what you thought about it, inspected the farm here in controversy, the Andrews' farm? A. I did.

Q. When?

A. November; about the 13th of November, 1941.

Q. When you went out there, tell the Court what you did in looking at the farm?

A. I went around over the farm and looked at the condition, and soil, and the condition it was in, and the timber, fence, and so forth.

Q. Did you go all over the farm?

A. Yes, sir; I went all over it.

Q. What did you find with reference to the soil?

A. Well, there were were about 75 acres that had been in cultivation, some of it recently and some of it hadn't been for a while.

Q. What did you find with reference to the improvements? That is, taking into consideration these two pictures of the buildings?

[fol. 893] A. I only saw one building on it, one shed.

Q. Which one had been removed, of these two pictures here, if either? (The witness observes the photos and returns one to Government Counsel)

Q. This is Government's Exhibit 3? This one had been removed when you were there?

A. Yes, sir. This one is the one that was there.

Q. And Government's Exhibit 4 was there when you were there? A. Yes, sir.

Q. You saw this picture, Government's Exhibit 3?

A. No, sir, I don't think I did.

Q. You didn't see the picture of it?

A. I don't think so; no, sir.

Q. How much of the place did you say was in the timber? A. About 20 acres.

Q. Was it cut-over timber? A. Yes, sir.

Q. Did you find any clover on the place?

A. No.

Q. And no alfalfa? A. No.

Q. What would you say was the reasonable market value of that farm, considering its location with reference to schools, churches, villages, cities, and roads?

A. $3072.00.

Q. $3072.00? A. Yes, sir.

[fol. 894] Mr. D. Watson: That is all.

Cross-Examination.

By Mr. S. Watson:

Q. What is the type of soil on that farm?

A. It is river bottom farm.

Q. I mean, what is the name of the classification of the soil?

A. I am not familiar with those names they have for soil.

Mr. S. Watson: That is all.

Mr. D. Watson: That is all, Mr. Murphy.

Forrest W. Hughes of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Q. Your name is Forrest W. Hughes?

A. Yes, sir.

Q. And you live at Foristell? A. Yes, sir.

Q. And have lived there how long?

A. Fifty-two years.

Q. You testified yesterday in the Callaway case?

A. Yes, sir.

Q. Mr. Hughes, I will ask you if at the request of the Government and being paid by the Government, you in-

[fol. 895] spected the farm here in controversy, the Andrews' farm, and if so, when?

A. Yes, sir; the 13th day of November, 1941.

Q. Tell the Court what you did when you went out to this farm, then.

A. We passed along the east side of the farm going to the Callaway tract, and then when we left the Callaway tract, we came in on the north end of the Andrews's place, and walked over the farm very carefully.

Q. Did you see all parts of the farm?

A. I did.

Q. How much of the farm would you say was in brush, or stumps, or timber?

A. About 19 or 20 acres.

Q. Was it mostly cut-over timber? or what per cent of it was cut-over timber?

A. All of it had been cut over.

Q. All of it was cut-over timber?

A. Yes, sir.

Q. The salable timber had largely been removed?

A. That is right.

Q. The farm has a hollow or so in it, does it not?

A. It slopes towards a hollow on the west side.

Q. So that, if it were plowed very much, it would likely erode and wash away considerably, with big rains?

A. Yes, sir; it shows erosion considerably.

[fol. 896] Q. It has already done that? A. Yes, sir.

Q. Have you seen these pictures, Government's Exhibits 3 and 4? or did you take them into consideration when you were looking at the farm? A. Yes, sir, I did.

Q. Assuming they were on the farm, what would you say about the improvements of the farm as to their being sufficient for a person to be attracted to that as a farm unit to live in?

A. It would be very unsatisfactory if a person had to live there and use them.

Q. It would be very unsatisfactory?

A. Yes, sir.

Q. In other words, you mean by that, that this farm in its condition, it was largely a farm you would have to rent out to a tenant? A. That is right.

Q. What about—

The Court: Why would that be?

A. It wouldn't have a sufficient dwelling, and other outbuildings were very poor.

Q. You mean by that, there is no place to properly live on it? A. That is right.

[fol. 897] Q. It is a common thing for people to rent land to people who live somewhere else, if they can find them that will rent their land? A. Yes, sir.

Q. I do not mean a tenant has to live in that kind of a place where others do not. I, and perhaps every other farmer, rent land to people who live on other farms and bring their machinery over on this farm. That is what I mean. I mean a field rented to an adjoining neighbor.

Mr. S. Watson: I move to strike the testimony out because the witness has not testified he saw the improvements.

Mr. Blanton: He said he took into consideration the pictures in arriving at value, though.

The Court: Overruled.

Q. Mr. Hughes, what would you say was the fair and reasonable market value of this farm as of about November, 1940? A. $3200.00.

Q. Now, you are taking into consideration the locality of the farm in reference to roads, schools, churches, villages, cities, and so forth? A. Yes, sir.

Mr. D. Watson: That is all.

Cross-Examination.

By Mr. S. Watson:

Q. Mr. Hughes, when you viewed the area, or viewed this farm, what did you know about the roads? How far was it to Howell, do you know, about?

[fol. 898] A. About two miles from the southern end of the farm.

Q. And what kind of a road?

A. It was a very good road.

Q. Did you know any other roads leading from that farm?

A. From the northeast corner of the farm is a road that goes east and then north, and finally goes to the highway.

Q. And what other roads?
A. And there is a road that goes west. I didn't follow that.
Q. You didn't follow that road?
A. No, sir.
Q. Did you visit the village of Howell?
A. Yes, sir.
Q. And what did you find there?
A. Well, it was a very active place at that time, a lot of construction going on.
Q. Quite a city there at that time?
A. Yes, sir.
Q. You were not able to know anything about the general surroundings there as of 1940, in November, were you?
A. Well, I had been through that area several times prior to that.
Q. You had been through there?
A. Yes, sir.

[fol. 899] Mr. S. Watson: That is all.

Mr. D. Watson: That is all, Mr. Murphy.

Mr. D. Watson: I think I have asked each of these witnesses to fix the value as of November, 1940. Did I do that with you, Mr. Cardwell? And you, Mr. Hughes?

Mr. Cardwell: Yes, sir.

Mr. Hughes: Yes, sir.

Mr. D. Watson: And with you, Mr. Murphy?

Mr. Murphy: Yes, sir.

Mr. D. Watson: Thank you.

John F. Briscoe of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:
Q. Your name is John F. Briscoe? State your residence, then, where you spent your early days.
A. I live in Hannibal at the present time, and I was raised in Ralls County.

The Court: In New London?

A. Yes, sir. And I have lived in Hannibal for about 20 years, and prior to that time, lived on a farm.

Q. Mr. Briscoe, you are now connected with the Federal Land Bank in St. Louis?

[fol. 900] A. That is right.

Q. And have been since 1933? A. Yes, sir.

Mr. Watson: I will not ask you these questions, though; they are already in the case.

The Court: In by stipulation.

Q. Mr. Briscoe, I will ask you this: Did you inspect and appraise the land here in controversy, the Andrews' farm?

A. Yes, sir.

Q. When? A. April 29, 1941.

Q. Tell the Court what you did, when you did that?

A. Well, I drove to the farm, and there are roads around practically three sides of it, and in the course of inspection, I have driven those roads, and we walked over the farm and inspected the soil and the land, and the crops that were on it, and the vegetation, and all of the physical assets that could be seen.

Q. I didn't get the last statement.

A. Physical assets.

Q. I hand you Government's Exhibits 3 and 4. Were they on the place at that time? or had they been taken down, then?

A. They were on there at the time I looked at the farm.

Q. Were there any other buildings there?

A. None that I saw.

Q. You went all over the place?

[fol. 901] A. I went all over it; I don't think there were any more on there.

Q. How much of that place would you say was in timber, or cut-over timber, or brush?

A. There was between 25 and 30 acres; some of it was scattering timber, and about 20 acres you might call rather heavy timber on it; it had been cut in and cut over, and there were some of the logs still on the place when we were there.

Q. Would you class it as primary cut-over timber or brush?

A. There was evidence that part of the timber had been cut over recently, or a short time prior to our inspection. There were logs out there. The trees had been trimmed up.

Q. Whiteoak? A. Yes, sir; whiteoak.

Q. Mainly whiteoaks?

A. Mainly whiteoaks, and some blackoaks, I think.

Q. You didn't find any walnut on it, did you?

A. I never noticed any walnut.

Q. Didn't find any elm on it?

A. I never noticed any.

Q. The elm and walnut are always on the good land, are they not? A. That is right.

Q. How much of it was cleared up, subject to cultivation?

A. About 65 acres; there were about 7 or 8 acres in scattered timber pasture, about 60 or 65 acres of it that could be cropped.

[fol. 902] Q. Was it sloping land?

A. There was no level land on it; no, sir it was sloping land.

Q. Was it land that you would say would wash if it were cultivated very much?

A. If not properly cared for in cultivating, it would wash.

Q. It was not terraced? A. No, sir.

Q. Did you notice any onions on it? A. Yes, sir.

Q. What does that indicate? A. That is a pest.

Q. We are talking about wild onions.

A. Wild onions. That area, there was quite a good deal of that territory, many of the fields with wild onions in them, and this was the spring of the year and they were noticeable.

Q. And that very seriously damaged the usefulness of it for pasture for milch cows? A. Yes, sir.

Q. And also for putting it in wheat?

A. Well, they dock wheat. This garlic here has onions in it.

Q. Are garlic and onions the same?

A. They are two different varieties of onion plant.

Q. What would you say was the fair market value of [fol. 903] that farm as of about November, 1940, taking into consideration its locality in the community as you

found it, the proximity or lack of proximity to churches and schools, and villages and towns and highways?

A. Four thousand dollars.

Q. $4,000? A. Yes, sir.

Mr. D. Watson: That is all.

Cross-Examination.

By Mr. O'Bryan:

Q. You say there were some wild onions? You saw quite a few of them? A. Yes, sir.

Q. They raise wild onions up in Ralls County, too? You have seen them in pasture? A. Yes, sir.

Q. And if your cow eats some, her milk doesn't taste good in the spring? A. No, sir.

Q. Did you find any rag weeds?

A. There are rag weeds in North Missouri.

Q. Did you see any on your own farm?

A. I can't say I did, that time of the year.

Q. Did you see any bull-nettles?

A. I don't remember having seen any; I don't know that I saw any bull nettles.

Q. Did you see any cockleburs?

[fol. 904] A. I don't recall having seen any cockleburs.

Mr. Blanton: We assume all of these questions assume facts which cannot possibly exist.

Q. Did you see any wild oats out there?

Mr. Blanton: This might be funny to Mr. O'Bryan, but after all, it is a measure of damages, and we respectfully suggest to him that he confine his questions to things he can expect an answer to.

Mr. O'Bryan: If the Court please, in answer to that I want to say all these witnesses have been saying they didn't see, and all these witnesses have been very impressive; they have testified what they didn't see; so I thought of a few things I didn't know whether they saw or not; I would just like to know.

Q. Have you ever studied the analysis that is used by the Missouri University Agricultural Department, of soil?

A. I took a course in soils at the Missouri University.

Q. There is a kind of a soil known as brown loess soils?

A. I think so.

Q. There is another kind known as grey—will you pronounce that "loess?"

A. No, sir; I don't recall calling that loess.

Mr. S. Watson: A kind of soil known as dark prairie soil.

A. I haven't kept up with the names of soil types, or the technical names they have.

Q. Now, those various classes and types of soil really [fol. 905] do have a bearing with reference to productivity of land, do they not?

A. I think they do; yes, sir.

Q. And according to the kind of soil is what you may expect? A. Yes, sir.

Q. And the kind of soil there also has to go to establishing the value of a farm for certain purposes?

A. Technical name?

Q. No, sir; the type itself.

A. Yes, sir; that is right.

Q. If it is what you call good old creek bottom soil, hip deep?

A. That is what we call it, creek bottom, hip deep.

Q. Creek bottom, hip deep, has really a whole lot more for production than soil upon the hill, hasn't it?

A. Yes, sir.

Q. But that doesn't have anything to do—

The Court: We are interested in what this property is worth.

Q. Does that have anything to do, that location of the property, for values for other purposes than agriculture?

A. The type of the soil and productivity and condition of it, what it is like, and where it is, have a bearing on the value of the farm.

Q. That is the way you establish the value of a farm?

A. Yes, sir.

Q. Did you take into consideration the fact that this [fol. 906] superhighway had been built from St. Louis out to that bridge? A. Yes, sir.

Q. And the fact that there had been a highway built by this land—not close by it but near to this land, on out to Wentzville? and on to Kansas City, known as Highway 40? A. Yes, sir.

Q. Did you talk with anyone in arriving at your value as to the price of the farm lands without that area, but within St. Charles County, as to what the increase had been in the price of other lands for use other than agricultural, when you fixed this price, this value?

A. I had been working in that section for about nine years, in Lincoln, and Warren, and St. Charles counties, and had frequented the court house, and worked with the Federal Land Bank, real estate they own and applications for loans and partial releases, and other work in that regard, and I think that I in that way had some idea about what farm lands were worth in there.

Q. When did the Federal Land Bank authorize you to make this investigation for the purpose of testifying here?

A. It was sometime in the first part of April.

Q. 1941? A. 1941.

Q. And you have been loaned by the Federal Land Bank to the United States District Attorney for the purpose of viewing this land and making up your mind and testifying in this case?

A. I was told by the Federal Land Bank to make this. [fol. 907] Q. In other words, they loaned you to the District Attorney's office for the purpose of testifying here?

(No audible reply)

Mr. O'Bryan: That is all.

DAVE THOMPSON, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Q. Your name is Dave Thompson, you testified yesterday in the Callaway case? A. Yes, sir.

Q. You just heard these witnesses who have testified on direct examination here, on value? A. I have.

Q. Would you say that their testimony is substantially correct as to the physical conditions of the farm here, the Andrew's farm?

A. I would.

Q. Without asking all those questions over, you made an inspection of this farm, along with Mr. Briscoe?

A. That is right.

Q. Sent by the Federal Land Bank out there to do that job? A. That is right.

Q. Tell the Court what in your opinion was the fair and reasonable market value of this farm as of about Novem-
[fol. 908] ber, 1940, taking into consideration the location of the farm, the community in which it was, the location of schools and churches, and towns and villages, and highways?

A. $4,000.00.

Mr. D. Watson: That is all.

Cross-Examination.

By Mr. S. Watson:

Q. You ratify everything that these other witnesses say, do you Mr. Thompson?

A. With reference to the physical condition of the farm?

Q. Yes, sir. A. Yes, sir.

Q. That includes the testimony that there were not any walnut trees on it?

A. There were a few; not enough to be of any sufficient value, I do not think, to add materially to the farm.

Q. But I believe you say now you have ratified? Do you ratify the proposition that walnut trees grow on good ground? I think the witnesses said that.

The Court: I think the attorney, Mr. Watson said that; he was not certain; that was a voluntary statement.

Mr. S. Watson: Oh, that is Mr. Watson's testimony. All right, that is all.

S. C. Harvey, of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

[fol. 909] Q. Your name is S. C. Harvey? A. Yes, sir.

Q. You are in the real estate business, and you testified yesterday on the Callaway case? A. Yes, sir.

Q. How long ago?

A. The last time was about in the first part of December—latter part of November.

Q. November, 1941? A. Yes, sir.

Q. At the request of the Government, and you are here at the request of the Government? A. Yes, sir.

Q. They are paying you for it?

(No audible reply)

Q. Tell us what you did when you went out and looked at this land?

A. The first time I went over the Andrew's tract of 94 and a fraction acres, I came on to it from the north, having been on the Callaway farm on the north side of the County highway, and it had been raining pretty heavy several days before the time I went over it, and as I walked back south on the property, with the woods on my left and was walking through the open portion of the land, the excavating people, I believe they were, had run some heavy trucks through there right straight down through the center of the property, and I followed off to the south, going south [fol. 910] on the property, and as I got over towards the center of it, I found that the top soil was pretty thin, as it was exposed by the ruts that the trucks cut in the land as it rolled off to the south.

Q. What do you mean by "pretty thin?"

A. Well, as I stepped upon the property from the highway, it looked to be 8 or 10 inches, but as I got further south, it tapered off until an inch or two, and finally I came to a point where it was practically clay, on which they had some lespedeza sowed. Then I turned around and came back. Our car was on the north side of the property.

Q. You were walking?

A. Yes, sir. Then we went around there to the east side and got out and went upon the property at about the point where the buildings had been located. At that point there was nothing but the large stones on which the sills had rested, and the ashes of the destroyed building were the only presence of the building at that point. I stepped off the size of the buildings and made my field notes as I went around. Then I went off to the south again. First, I went a little north into the woods where the men had been cutting timber, and then back into the woods back of the house a short distance and off on the south portion of it. The soil further down was commencing to get a little thicker again at that point, but the clay was pretty well exposed, and practically the top from the center portion.

This property has this County highway which runs down [fol. 911] the east side. It runs across the north side and jogs down south about half way on the west side, and the highway turns west at that point, and I think it goes as far as the old Colony Road. I have been on it, but forget just where that terminates.

Q. Would you say it had the appearance of having been pretty badly washed?

A. No, sir, the erosion had not been so much, that is, in the way of gullies, but the top soil had been eroded off a portion.

Q. That is what I am talking about, the top soil; that is the producing part of the land? A. That is right.

Q. And, in places, that which you term the producing part had washed clear away and left the subsoil?

A. That is right.

Q. How many acres would you say were in woods or brush, or stumps?

A. Well, there were three portions of the property that had timber or brush on it. The main portion was in the northeast corner, however, north of the house, that was the best part of it, about 19 or 20 acres, I imagine in the whole tract.

Q. Now, you heard the witness Meyer testify, for instance. Would you say that he gave a substantially accurate version of this farm?

[fol. 912] A. I think so.

Q. As to its physical condition?

A. I think most of it was correct; yes, sir.

Q. Now, Mr. Harvey, tell the Court what investigation you made as to equipping yourself to give a fair value of this farm?

A. Well, I went down to the court house in St. Charles and went to the Recorder's office and examined the records not only of the property adjacent to this piece but, altogether, about 90 tracts of property where sales had been made in the area.

Q. Within the Weldon Springs area? A. Yes, sir.

Q. In what period of time?

A. Period of the last five years.

Q. Last five years back from the time you examined it?

A. From the time I was on the property.

Q. And that was in December? A. Yes, sir.

Q. Did you find any properties that had been conveyed that were of a similar nature to this farm?

A. There was a tract to the west of this, on the same road, that had been conveyed in the year 1938, along about August, about a year and a half after the highway had been opened up there.

Q. Did you go on that farm?

[fol. 913] A. I went down the road but did not walk all over the property, but viewed it from the road as I went around there.

Q. What did that farm sell for?

A. May I refer to my records?

Mr. Watson: Yes, sir.

Mr. S. Watson: If the Court please, I object at this point to this testimony. This witness has not testified he made the same; it is hearsay evidence.

The Court: Overruled.

A. The tract contained approximately 68 acres.

Q. All right.

A. And the price, as indicated by the record, was around—

Mr. S. Watson: If the Court please, I object to that. He says "the price as indicated by the record."

Q. Let me ask you, what investigation did you make of the records with respect to that sale?

A. We went in and took the books and page numbers and examined the stamps, revenue stamps referred to in the consideration on each one of the sales as indicated.

Q. Did the revenue stamp show to corespond as to the amount that should be under the law put on the deed with reference to the recited consideration?

A. Yes, sir.

Q. Did you make any further investigation? Did you talk with the grantor or grantee as to the price?

[fol. 914] A. In this particular case—

Mr. S. Watson: If the Court please, object to anything that the grantee or grantor told him; that would be hearsay.

Mr. Blanton: We have not asked what they said, Mr. Watson.

Mr. S. Watson: Very well.

The Court: Objection overruled.

A. We attempted to locate these parties. One of them, the conveyor, was a man by the name of Nadler conveying to a party by the name of Mound.

Q. Did you find either of those parties?

A. We attempted to see them at one time, but never had time to go back to these particular people to check up the balance of the information.

Q. You stated this was how many acres?

A. Approximately 68 acres.

Q. It was a similar character of farm to this other one, except it was different acreage to the Andrew's farm?

A. There was a little more timber on this tract.

Q. Which do you mean by "this?"

A. This Mound tract, 68 acres, than there was on this Andrew's tract.

Q. What about the improvements on it?

A. No improvements on it.

Q. No improvements on the Mound tract at all?

A. No, sir.

[fol. 915] Q. What kind of a deed was it?

A. Warranty deed.

Q. Warranty or Quit-claim?

A. Warranty deed.

Q. General Warranty Deed?

A. Yes, sir.

Q. What did you find to be the consideration for that sale?

A. May I get the rest of my record from my file there, please?

The Court: Yes, sir.

The Witness: That is the book and page number.

The Court: How long will it take you to get it?

The Witness: They are right here. Pardon me. (Witness procures some papers and returns to witness-stand.)

Mr. D. Watson: Now, there was a question asked you and you were getting your notes to answer.

A. With reference to the price and revenue stamps and the consideration.

Mr. S. Watson: If the Court please, object on the ground that the record itself is the best evidence.

The Court: Overruled.

The Witness: Now, the record I checked in the Recorder's office at St. Charles shows Theodore Nodell conveyed to Hilda and Fred Mound, dated August 25, 1938, under a warranty deed, recorded in Book 187, page 475, consideration $100 and other valuable considerations; $2 in internal [fol. 916] revenue stamps attached. Now, the record did not recite any deed of trust given back; so that it was something under $2,000 that was paid for that property.

Q. Otherwise, stamps would have been required to be more than $20?

A. Or the mortgage would have been recited; either one or the other would have had to be in the record.

Q. Now, what do you say was the reasonable market value of the Andrew's farm as of November, 1940?

A. $2800.00.

Mr. D. Watson: That is all.

Cross Examination.

By Mr. O'Bryan:

Q. Mr. Harvey, you testified that the deed you examined had two dollars worth of revenue stamps on it?

A. That is what the record showed.

Q. And it was made in 1938?

A. Yes, sir.

Q. At that time you had to put on 50 cents for each $500, didn't you?

A. That was correct at that time; since then, it has been increased.

Q. It is one ten now a thousand?

A. Yes, sir.

Q. At that time it was 50 cents for each $500?

A. Or fractional part thereof.

[fol. 917] Q. Then, uunder those circumstances, with the amount of stamps you are going by, the "other valuable consideration" would have had to have been in excess of $1400 with $2 worth of revenue?

A. It would have had to be recited, if there was any more consideration on there.

Q. You said that it recited $100 and other valuable considerations?

A. Correct.

Q. Well, if it recited plainly upon its face, $1500, it would have taken a dollar and a half in stamps, wouldn't it?

A. That is right.

Q. And if it had recited $2,000, from anywhere from $1500 and $1,000 up to $2,000, it would have to be another 50 cents?

A. That is right.

Q. Therefore, you have to take into consideration the estimation that was placed on the consideration by the seller and by the purchaser was in excess of $1400 to justify and understand the $2 worth of stamps?

A. Fifteen hundred? in excess of $1500?

Q. There was $100 cash?

A. Yes, sir; that is right; in other words, it would have to be in excess of $1400.

Q. Isn't that right?

A. To bring the stamps up.

Mr. Blanton: He has admitted it could be anything up [fol. 918] to two thousand.

Mr. O'Bryan: I wish you would let me examine the witness as I want to. I never have caught up with you since the amending.

Q. Now, this 68 acres had no improvements on it at all?

A. Not that I saw.

Q. Where was the 68 acres located with reference to this 94 acres? How far?

A. Well, sir, this county highway ran between the Andrew's tract and the Mound tract, and the highway didn't skirt the southern portion of the Mound tract, but left a piece of the Nieman lying between the Mound property and the county highway on the south.

Q. Did the Weldon Springs Ordnance area take in the Mound tract? Do you know whether or not this Mound tract was taken into the Weldon Springs area?

A. Yes, sir; it was.

Q. Was it purchased by McDowell for the Government?

A. There was no evidence of any deed on record at the time I examined the records.

Q. Do you know whether or not an option was taken on it?

A. No, sir.

Q. You never talked to them about whether an option was taken?

A. No, sir.

Q. You don't know whether or not a price was set on it [fol. 919] by the owners of it, in November, 1940, with the Government?

A. No, sir.

Q. You examined a great many records out there; was there an increase in the sale price of land in that area after the completion of the highway and of the opening of the Daniel Boone Bridge, in accordance with the records you looked at, did you find any increase in prices?

A. The records, where sales had been made in 1938 and 1939, that was after the highway had been opened, because that was opened along in—

Q. Just agree it was opened in June, 1937.

A. I think that is approximately right. There had been no subsequent transfers on the properties—there was one transfer, so I couldn't tell whether the price indicated in the transfer was any different from what it would have been if it had been prior.

Q. That is, the one you testified about in 1938; that is, "100 and other consideration" was the only sale that had been made in the area in the three years?

Mr. Blanton: He said ninety sales.

A. Ninety sales had been made in that area.

Q. Ninety sales had been made between 1937 and November, 1940?

A. Yes, sir.

Q. I will ask you whether or not you examined the [fol. 920] prior conveyances, prior to 1937, as to what the consideration was as stated in the deeds at that time?

A. Well, I have some here in 1933 and 1934 and 1935, recite much less figure than what I quoted.

Q. The consideration in 1933, 1934 and 1935 was less than the amount recited in the deeds for sales after 1937?

A. I didn't get a chance to get over these properties to find out whether the particular place that was sold for less money was because it was a hole—I didn't get on to that particular piece.

Q. I asked you was there an increase in the value of property out there in accordance with the records?

A. I couldn't tell from the records. There are variations in prices up and down both ways. I don't know just what caused those variations, whether a fine farm or poor farm, or a piece of rough hill land. I saw the prices on here, but I can't say why the variations were in there.

Q. The fact of the business is, you didn't examine to make up a table for comparison of the prices for five years prior to 1937, and the prices after 1937?

A. No, sir.

Q. You just looked around and got the price of what the conveyances had been?

A. Over a period of years, yes, sir; a five-year period.

Q. But didn't go back to prior deeds and prior convey-
[fol. 921] ances?

A. No, sir.

Q. You looked at one transfer, and that was the transfer that occurred in that five years? If there were two transfers in that five years you didn't look back at the others?

A. I haven't got any, where there were two transfers on one property.

Q. So you didn't really make any comparison, did you?

A. I don't know how I could have made a better one.

Q. You are a real estate agent?

A. Yes, sir.

Q. And you know values of property and you know the location of the property, rises and increases of value, or property that decreases?

A. There are a lot of things that enter. I couldn't say any particular piece was raised on account of any particular improvements. What my impression is, one piece of property might injure another. That happens fre-

quently. A store might depreciate, and the residence right next to it.

Q. On the other hand, a paved street coming down through town and the other muddy streets on both the other sides, the property on the paved street will be worth more than the property on the muddy street?

A. That would be true if it goes anywhere or is a con- [fol. 922] venience for the property that the people want to have access to.

Mr. O'Bryan: That is all.

Redirect Examination.

By Mr. D. Watson:

Q. I think I asked you if you took into consideration the locality and surroundings in arriving at the value you have testified to?

A. Yes, sir.

Q. Did you and Mr. Thursby go together on this inspection?

A. I think I, myself; there might have been some—

Q. On this farm, the Andrews farm?

A. Yes, sir; I am pretty sure he was on that.

Mr. D. Watson: That is all.

J. R. Thursby of lawful age, produced, sworn and examined, testified on behalf of the Government as follows:

Direct Examination.

By Mr. D. Watson:

Mr. O'Bryan: I would like to make a request. We have one witness [than] can't be here tomorrow, and we want to use that witness.

Mr. D. Watson: We will be through with this one in five minutes.

Q. Your name is J. R. Thursby?

A. Correct.

Q. You testified yesterday in the Callaway case?

[fol. 923] A. I did.

Q. You made an inspection at the Government's request and on Government pay of the Andrews farm, along in December, 1940, did you?

A. Somewhere between the 2nd of October and the 15th of December.

Q. Were you and Mr. Harvey together when you made that inspection?

A. We were.

Q. You heard Mr. Harvey's testimony just now on the witness-stand?

A. I did.

Q. And you say that testimony is substantially true as to the physical condition of the farm?

A. I would say so.

Q. Is there anything you desire to add to it to properly describe the physical condition of the farm?

A. The only thing I can add to it, it reminded me of a farm my sister owns in Franklin County, in which I have a small interest. It is a very poor farm in Franklin County, and this one reminded me of it.

Q. What in your opinion was the reasonable market value of this farm as of about November, 1940, taking into consideration its location, and with reference to churches, [fol. 924] schools, villages, cities and highways?

A. $2555.00.

Mr. Watson: That is all.

Cross Examination.

By Mr. O'Bryan:

Q. You say you looked at this property in October, 1940?

A. I think it was probably more in November, 1941.

Q. You were not out there in 1940?

A. No, sir.

Q. You kept saying 1940 to Mr. What's his Name.

A. I didn't intend to do so.

Q. What value did you say you placed on that property?

A. $2555.00.

Q. $2555.00?

A. Yes, sir.

Mr. O'Bryan: That is all.

Mr. D. Watson: That is all.

Mr. Blanton: We rest, Your Honor.

Mr. O'Bryan: It will take about three minutes.

The Court: Announce a 5-minute recess.

Thereupon, at 4:30 P. M., April 3, 1942, a recess of 5 minutes was announced. The proceedings then continued as follows:

Mr. Blanton: I think in view of the fact that the testimony of the witness before the last indicated the consideration shown in this deed to which he made reference [fol. 925] on, I believe, the Mounds tract did not recite an actual consideration except $100, and that he didn't interview either one of these people, I am going to ask the Court to sustain the motion to disregard the testimony about that transaction; as far as the Government is concerned, it may be stricken from the record.

Mr. O'Bryan: May I ask the Court to also disregard all the rest of the testimony?

The Court: Yes, sir, you can ask, but the Court will overrule your request.

(Additional Testimony for Defendants.)

Thereupon, the defendants to further sustain the issues in their behalf, offered and presented the following additional testimony.

R. A. Langenbacher of lawful age, produced, sworn and examined, testified on behalf of the defendants as follows:

Direct Examination.

By Mr. O'Bryan:

Q. You testified yesterday in the Callaway case?

A. Yes, sir.

Q. And you testified the other day for the Government in that same case?

A. Yes, sir.

Mr. O'Bryan: We will agree, Mr. Blanton, he is a farm agent?

Mr. Blanton: Yes, sir; the record as it was shown in the other case. It is in the record. We will not require [fol. 926] him to go through that again.

Q. I will ask you if in 1938 you, acting as representative for the Masonic Home Association of Missouri, made a sale of any land across the road from this Andrews tract?

A. Yes, sir, I did.

Q. Was a warranty deed given?

A. Yes, sir.

Q. By the Masonic Home of Missouri?

A. That is right.

Q. Recorded in St. Charles?

A. Yes, sir.

Q. I will ask you what the consideration per acre of that tract of ground was?

Mr. Blanton: I think there should be some testimony to show the circumstances and conditions of the tract, the terms and conditions of the sale, and so forth.

Q. State whether or not it was a sale for cash?

A. Yes, sir.

Q. And the consideration was expressed in the deed?

The Court: Where was it?

Mr. O'Bryan: Right across the road from the Andrew's tract.

Q. To whom was the sale made, Mr. Langenbacher?

A. I don't remember the name; they were Italians from St. Louis that bought it, and we transferred it to them, five acres, unimproved.

[fol. 927] Q. It was five acres unimproved ground?

A. Five acres with small oaks and rocky ledge, without any land that could be plowed except possibly a little patch down by the creek.

The Court: In the location of a still?

A. No, sir; the road went around it; it was not very isolated, but it had a road around it, and it was a rocky ledge without any farm land that could be used. It was in the shape of a triangle.

Q. What did you get an acre for that?

A. $75.

Q. That was expressed in the deed?

A. I think that was, $375 net to the Masonic Home of Missouri.

Q. And that deed was delivered and recorded in 1938?

A. The records will show what date the deed was.

Q. Have you a soil map of St. Charles County with you?

A. Yes, sir; I have the official soil survey made by the soil survey experts in 1938, under the direction of our office assisted by Mr. Schroeder of the Soils Division of the United States Department of Agriculture.

Q. Do you know the Andrews tract of land?

A. Yes, sir; I do.

Q. You are not interested in this case? You are not a paid witness, neither have you any interest in the out- [fol. 928] come of this case, have you?

A. No, sir; I have not.

Q. You are coming here and testifying voluntarily?

The Court: For both parties.

Mr. O'Bryan: Yes, sir, and he was put on the stand for them first, without getting any money.

Q. Mr. Langenbacher, how many times have you viewed the Andrews tract of ground?

A. I do not know. I have been by the tract of ground before the TNT plant was established, I suppose twenty times since I have been in St. Charles County.

Q. Did you ever make any soil analysis of the ground? any of it?

A. Yes, sir.

Q. Do you know what kind of soil underlies that ground?

A. That soil is mostly of the Clinton silt loam. There is a little strip across the north end, of Putnam, but that is possibly only about three acres, and the balance is Clinton silt loam. And I think I should differentiate between the soils: Putnam loam is a shallow gravel soil, with a very tight impervious subsoil. Clinton silt loam is a brownish soil, 10 to 15 inches from the top soil originally, and this top soil in the woods and places where the erosion had not taken it off, indicated this soil had had 14 inches of top soil.

Q. One of the witnesses this afternoon for the Govern-
[fol. 929] ment said this was sour soil. State whether or not that is a fact?

A. I have heard that statement made, I suppose a thousand time in the county. They mean, when they say "sour soil," they mean a soil deficient in calcium and gets an acid condition that doesn't readily grow legumes; but no one can tell by growth on land whether it is acid or not. We have soil tests, a very highly developed soil test; it is not very hard to make, but very well developed, but will tell very quickly whether it is acid or not. This soil that was acid requires about three tons of lime per acre.

Q. And that can be cured?

A. Yes, sir.

Q. How do you get rid of wild onions?

A. Double plowing late in the fall, to turn them up so the frost gets them, and in the spring, about June, when the onions are grown up, just before they set bulbs on either top or bottom, plow them under again. That is what we mean by double plowing.

Q. That gets rid of wild onions?

A. Yes, sir; if they do a good job.

Q. What about lespedeza?

A. Lespedeza is a very good legume, grown possibly more than any—I presume there is more acreage of lespedeza in Missouri than all other legumes combined.

Q. What is it good for?

A. For soil building, and splendid hay and very splendid pasture.

[fol. 930] Q. It is good pasture and makes good hay?

A. Yes, sir.

Q. To eat dry, and fed in the winter time?

A. Yes, sir.

The Court: When was lespedeza introduced?

A. I think not over ten years ago that it was introduced in a large amount. It is a relatively new plant in Missouri, and it has spread over the State very rapidly.

Q. I will ask you if it didn't spread in the CCC camps?

A. They did work planting lespedeza to stop erosion in various localities, and a popular education was on soil conservation.

Q. And lespedeza is one of the crops they use in soil conservation?

A. It has a big stand; its roots are not so large, but it grows close and thick on the ground.

Q. You testified yesterday about the building of the Jefferson—I mean the Daniel Boone Bridge and the highway out to Wentzville?

A. Yes, sir.

Q. And you testified about that ground being more valuable after the construction of that bridge and the opening of that road, and more demands made for it?

A. Yes, sir.

Mr. O'Bryan: We may adopt all that part of his testimony?

[fol. 931] Mr. Blanton: Yes, sir; it was the record yesterday, Mr. O'Bryan.

Q. On what you testified yesterday, and in addition today, stating your knowledge of things and qualifications, I will ask you what you would place the fair value of that farm at?

Mr. Blanton: What do you mean by "fair value?"

Mr. O'Bryan: I mean fair value of your sale of that farm by somebody that doesn't want to sell, and somebody that wants to buy and wants to induce them, what would be the fair value, if you were the owner of the farm, what would be a fair value to place on the farm?

Mr. Blanton: Object to that as not being a true measure of damages as to the true market value of the property

Mr. O'Bryan: I want to except to that objection for the reason it has been alleged that the consideration placed in the offer to purchase, and the offer to purchase in the contract, and the amount set forth in the deed, is the amount that the Secretary of War agreed to give for the—

Mr. Blanton: No, sir; the Secretary of War did not.

Mr. O'Bryan: It was agreed to give for the property. Mr. Blanton said the Secretary of War didn't do it at all. The Secretary of War is the head of the entire army, whether the Ordnance Department, or Quartermaster, or

what, and every action taken by Col. Valliant was taken, not under the specific directions of Mr. Stimson but under [fol. 932] his authority, delegated to him by the various orders of the War Department, that you have introduced, and the Act says that the fair value—

The Court: Reasonable value is what you were talking about in the other case.

Mr. O'Bryan: Yes, sir; the Secretary of War said the property had a reasonable value.

Mr. S. Watson: The Act says "The Secretary of War may purchase land on a basis of an offer made by the landowner, reasonable in the opinion of the Secretary."

Mr. O'Bryan: Yes, sir. Now, under the circumstances, I think we are entitled not to be bound by the market value but what the offer was, and whether it was reasonable in the opinion of the Secretary of War.

Mr. Blanton: This man cannot know what the Secretary of War had in mind.

Mr. O'Bryan: No, sir; but he can say what the reasonable price was.

Mr. Blanton: It took into consideration too many factors that do not constitute proper elements for measure of damages.

The Court: There is a distinction between reasonable value and fair market value.

Mr. Blanton: I do not know what it would be.

The Court: What might be the fair market value might not be the reasonable value; it might be the same as reasonable value under circumstances of that sort.

[fol. 933] Mr. O'Bryan: That is the very point in this case, if the Court please, all the way through. Mr. Blanton has tried to hold us to market value and what would be a reasonable value, and I think this man is qualified to answer that question, and I think if we can take words and phrases I think we will get the definition of market value and reasonable value that has been held by the

courts. There is a difference. (Here the Court refers to a law-book furnished by Counsel).

The Court: Is there a question before the Court?

Mr. Blanton: Yes, sir.

By Mr. O'Bryan:

Q. Mr. Langenbacher, did this farm have a spring on it and living well?

A. It has a well about 20 feet deep that during the drouth had about 5 feet of water in it. It indicated it was fed from a subterranean source of water.

Q. State whether or not this place had a building site on it, that was very noticeable?

A. I think the corner at the road that turns to Howell was as nice a building site as found in the interior part of St. Charles County anywhere.

Q. Now, taking into consideration the construction of this highway and this bridge across the Missouri River, and the location of this land in connection with this road, and the building site and the living well, and its soil as you have testified to, are you acquainted with what would be [fol. 934] the fair and reasonable value of this property?

Mr. Blanton: To which we object for the reason we are trying to fix the value of the property which the Government is seeking to buy, and which the defendant is seeking to sell, whether it can be acquired by direct purchase or a condemnation. The true measure of damages is the reasonable value—that is, what a willing purchaser will pay, who doesn't have to buy, and what a willing seller will take, who doesn't have to sell. And we think this question as framed does not combine those necessary elements, and for that reason we object to it.

The Court: Overruled.

Mr. Blanton: Note our exception.

Mr. O'Bryan: Go ahead and answer.

Q. Are you acquainted with it?

A. I am somewhat confused with the question. I have in mind two distinct values: what it would sell for for farm value only, and what it would sell for to someone coming

out of St. Louis, that wants a country homesite, and is willing to pay for it.

Q. What would it sell for as a farm value?

A. I think that farm would sell for $50 an acre.

Q. What would it sell for at a reasonable value for someone wanting it for a homesite?

A. I think someone from St. Louis that wants a site [fol. 935] would pay as high as $125 an acre for that ground.

Q. You think it is worth as high as $125 an acre for the other purpose?

A. To the fellow that wants it for that, or a farm.

Cross-Examination.

By Mr. Blanton:

Q. You mean that is a speculative value? Do you mean that?

A. I wouldn't say it is speculative.

Q. But it would be wanted for some specific purpose?

A. Yes, sir; it is something he wants to live on and go out week ends on.

Q. But most of that property in that immediate area was used for farming purposes, was it not, Mr. Langenbacher? A. You said most of it?

Q. I said in that immediate area.

A. Most of the land is used for farming purposes, but there are farms that have sold in the immediate vicinity at much more than $125 an acre.

Q. Where?

A. The Richard Fletsch farm sold on 94, which is a mile west, fifty-four acres.

Q. What kind of improvements on that place?

A. Practically no improvements. There was an old barn.

Q. What was the nature of the soil?

A. Clinton silt loam.

Q. What was that farm sold for?

[fol. 936] A. That was sold to a city man that wanted some place—

Q. A man who didn't know values out there?

Mr. O'Bryan: Object to that and move to strike that out.

Mr. Blanton: I think that is a fair question.

The Court: Sustained.

Mr. Blanton: We offer to show the man who bought that, bought no values. I think this witness will testify to that.

Q. Now, this five acres you say you sold from this Masonic tract, did you negotiate the sale of the balance of this Masonic tract?

A. Yes, sir; that was all there was in the particular tract but I negotiated the sale of another tract close to this one.

Q. That is the one closed after the Government bought these options that were set aside, that were handled before Judge Bigger of Hannibal? Did you have anything to do with that?

A. I don't know what that was, but this was fifty acres—

Q. I asked you if you negotiated the other sale that Judge Bigger from Hannibal was the advisory counsel in?

A. I think not.

Q. These five acres that you say were sold to this Italian, what did he do with it?

A. Built a clubhouse on it.

Q. What kind of a clubhouse was it?

A. I think it was rock dug out of the ground right there [fol. 937] where he built.

Q. When you say "clubhouse," do you mean public resort? A. I think not.

Q. Just a private home?

A. I couldn't say that. I know he spent week ends out there because he stopped at the office on his way out, and I was out one Sunday and he was at the place.

Q. He didn't buy it for farming purposes?

A. Not at all.

Q. I will ask you now what would you say this farm for all-around purposes, general purposes, would be worth, the market value? By that, I mean a person who is willing to sell but doesn't have to sell, and a person who would buy but doesn't have to buy, leaving out the speculative feature and possible use, and leaving out the Weldon Springs Development, as of November, 1940?

A. I haven't thought of the Weldon Springs development, but I have given a good deal of credence to the new bridge and highway and the new road that cuts in from the highway past this place.

Q. You took that into consideration when you fixed a value of $50 an acre?

A. For farm value, yes, sir, and also $125 value for the fellow that wants to come around and play around on it.

Q. To play around on it? A. Yes, sir.

[fol. 938] Q. I will ask you if you didn't make the statement to the F. B. I. when you were interrogated, that none of that property in that area was worth over $100 an acre for any purpose?

A. I would have to refer to that record, because I do not remember what statement I did make.

Q. You do not say you didn't? A. No, sir.

Mr. O'Bryan: You say $100 an acre?

Mr. Blanton: There is none of it in the area to exceed $100 an acre.

Q. Didn't you place the bluff land at worth $25 an acre?

A. I think I placed the bluff land less than this.

Q. From twelve to twenty-five dollars an acre?

A. Something like that.

Q. You said you had been on this place probably 15 or 20 times? A. Yes, sir.

Q. What was the occasion of your going on to the place?

A. That place had a road around three sides of it, and we made many of those in connection with the detail soil survey in the places that the line between the Putnam and Clinton went through the land; and, previous to that, we had made a soil acidity test on these divisional lines between the types of soil. We went on a good many times and took a recheck, and I helped check all the lines in that survey.

[fol. 939] Q. How long had it been since anybody lived on that farm to farm it?

A. That lived on the farm to farm it?

Q. Yes, sir.

A. I don't know that I remember. As I remember it, when I first came to St. Charles County, there was someone that lived on the place and operated it, but I would not be surprised in the last fifteen years if there was no one on the place.

Q. Did you notice these wild onions growing on this place, there has been some testimony about, on the twenty trips you went on it?

A. Yes, sir; it takes good land to grow good wild onions.

Q. You differ from these other witnesses, do you?

A. Wild onions like to get thick where alfalfa grows.

Q. Did you ever see any alfalfa on that place?

A. No, sir, I did not, but I saw alfalfa on exactly the same type of land.

Q. I didn't ask you that, I asked you if you saw alfalfa on this place? A. No, sir.

Q. I will ask you if it is not a fact that lespedeza will grow where onions or other legume crops will grow.

The Court: The court is more interested in whether the land will grow alfalfa than whether he saw it on there.

[fol. 940] A. All the ground on this land, except the streak of Putnam through there, which is a small acreage —I don't think there is over five or six acres of Putnam on it—but all the rest of the ground, if limed, will grow good alfalfa.

Q. What does it cost to lime an acre?

A. About $1.40 a ton on the land.

Q. That would be about $4.20 an acre?

A. Yes, sir; four to five dollars.

Q. And you have to carry it over?

A. In that area they will put the lime on the land, but a man has to spread it.

Q. You have not seen anybody, who thought it was sufficiently good for alfalfa, to put any on it, have you?

A. That particular farm, there has not been anyone enough interested, other than the man that bought it. It has been rented to Mr. Schulte.

Q. Can't you answer the question, whether you did or did not?

(The last preceding question is read to the witness)

A. I have not seen any alfalfa on the ground.

Mr. Blanton: All right; that is all.

Mr. S. Watson: That concludes our evidence, Your Honor. We ask leave to file a written motion to strike out the testimony of each witness. We also ask leave to file motion to strike plaintiff's amended reply.

[fol. 940-a] Mr. Blanton: Your Honor, may it be understood we can take the same time in which to submit briefs in this case as the other case? Is that agreeable with you, Sam?

Mr. O'Bryan: Why not submit carbon copies?

Mr. Blanton: That is what we propose to do.

The Court: A carbon copy will do just as well. It is submitted, is it, gentleman?

Mr. Blanton: Yes, sir; Your Honor.

Conclusion of the Evidence and Proceedings in This Case.

Certificate of Court Reporter:

I, Albert O. Phelan, do hereby certify that on April 3, 1942, I reported in shorthand the proceedings in this case, and that the foregoing is a true and correct transcript thereof.

A. O. PHELAN,
Court Reporter.

[fol. 941] Memorandum of the Clerk of the U. S. District Court.

The testimony and proceedings at the trial in cases Nos. 765 and 807 have been omitted from the transcript at this point for the reason they appear in preceding order and will be found on pages of this transcript of record on appeal numbered as follows:

Case No. 765, (Marginal) pages 54 to 481 both inclusive.

Case No. 807, (Marginal) pages 482 to 661 both inclusive.

[fol. 942] United States of America, Plaintiff,
No. 874 vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Memorandum Opinion

(Filed July 6, 1942)

The above styled cause is companion with numbers 807 and 765 in the two other divisions of this court, opinions in which are filed this day by Judges Davis and Collet, respectively. The three cases are [idential], save that they concern different pieces of land in the same vicinity. With the exception of the questions of the amount of participation of the individual owner in the alleged fraud and of the reasonableness of the option price in the particular parcel, the issues have been treated as one by counsel in joint briefs filed in each of the three cases.

I have carefully studied the records, the briefs and the above mentioned memoranda of my brothers Davis and Collet and it would appear that an extended opinion on my part could serve no purpose and would be but superfluous repetition.

I find myself unable to concur in the view taken by my learned brother Collet in No. 765 that the options here at issue are void for the reason that they constitute a cost-[fol. 943] plus-a-percentage-of-cost system of contracting. It is, indeed, unfortunate that the uniformity anticipated from this court's action in sitting en banc in No. 765 will not be achieved, but I am convinced that justice lies with the views expressed in the able memorandum of Judge Davis in No. 807. I, therefore, to the extent that it is applicable, concur in and adopt as my own that said memorandum and direct that it be considered as the opinion of the court in the case at bar.

The record may show a denial of the defendants' motion to strike portions of the reply.

The option contract being valid, the appointment of commissioners in condemnation should be dispensed with, judgment entered vesting title in the plaintiff and compensation fixed at the option price of $12,000.00. It is so ordered and judgment accordingly may be submitted for signature and entry.

(Signed) GEO. H. MOORE,
United States District Judge.

Dated this 6th day of July, 1942.

[fol. 944] United States of America, Plaintiff,
Docket No. 874 vs. At Law
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Plaintiff's Motion For New Trial

(Filed July 9, 1942)

Now comes plaintiff and moves the Court to set aside its verdict, Findings and Judgment and to grant the plaintiff a new trial herein and assign as reasons therefor the following, to-wit:

1. Because the Findings and Judgment of the Court is against the evidence and against the weight of the evidence.

2. That it is against the law under the evidence.

3. The Court admitted over plaintiff's objection and exception, incompetent, irrelevant evidence offered by the defendants.

4. The Court refused to admit competent and relevant evidence offered by the plaintiff.

5. The Findings and Judgment of the Court is against the law and is not supported by the evidence.

6. The Court made no Findings of Fact and gave no Conclusions of Law.

The Court erred in failing to find under the evidence, that:

(1) The defendants, William M. Andrews and Bertha L. Andrews, and R. Newton McDowell and others, conspired to defraud the plaintiff and to fraudulently procure an inflated price from the plaintiff for the land herein condemned.

(2) McDowell was a faithless agent, and that he and the defendants wilfully, falsely and fraudulently represented to the plaintiff that said lands were of a value greatly in excess of the true value thereof.

[fol. 945] (3) That the defendants know that the value of said land, as represented to plaintiff by McDowell, who was for that purpose their agent, was a grossly inflated price far in excess of the true market value thereof and far in excess of the reasonable value of said land, and so knowing seek to profit by said fraud and are prohibited under the law from taking advantage of said McDowell's fraud and are prohibited from recovering under the option agreement.

The Court erred in failing to find that defendants cannot recover because, to do so, they would profit from the illegal and fraudulent action of McDowell.

7. The Court erred in failing to find the agreement relied on by the defendants is unlawful and against public policy because:

(1) Said agreement is contrary to the provisions of the following Congressional Acts:

The Act of July 2, 1940, Public No. 703 (54 Stat. 712);

Public No. 781 (54 Stat. 782);

Section 22 of Title 41, U. S. C. A.;

Section 66 of Title 5, U. S. C. A.;

Section 2 (a) (1) of the Act of June 28, 1940 (54 Stat. 676);

Section 1 (a) of the Act of July 2, 1940 (54 Stat. 712);

Section 2 of the Act of May 2, 1941 (55 Stat. 148);

Section 201 of Title 2 of the Act of December 18, 1941, known as the First War Powers Act of 1941;

Section 301 of Title 3 of the Act of March 27, 1942, known as the Second War Powers Act of 1942 (Public No. 507);

Section 16 of Title 41, U. S. C. A;

(2) And is contrary to the following provisions of the Code of Federal Regulations:

Volume 10, Code of Fed. Reg. Title 41, page 7 (1321).

Volume 10, Code of Fed. Reg. Title 41, page 12 (1326).

Volume 10, Code of Fed. Reg. Title 41, page 32 (1346).

Volume 10, Code of Fed. Reg. Title 41, page 34 (1348).

Volume 10, Code of Fed. Reg. Title 41, page 37 (1351).

Volume 10, Code of Fed. Reg. Title 41, page 38 (1352).

Volume 10, Code of Fed. Reg. Title 41, page 49 (1363).

Volume 10, Code of Fed. Reg. Title 41, page 50 (1364).

[fol. 946] 8. The Court erred in sustaining the validity of said option agreement because it provided for a cost-plus-a-contingent-fee of 5% and such an agreement is illegal, because:

(1) It tends toward working a fraud on the plaintiff Government.

(2) It did work a fraud on the plaintiff, and

(3) The defendants, by the Court's Findings and Judgment, reap a benefit from said illegal agreement and are parties to it, and

(4) It is contrary to 10 Code Fed. Reg. Title 41, page 15 (1329); 10 Code Fed. Reg. Title 41, page 34 (1348).

9. The Court erred in holding that the plaintiff government is bound by the Acts of its officers when they exceed their authority in negotiating or accepting said option agreement, regardless of whether such unauthorized acts are the result of accident, mistake, fraud or otherwise.

10. The Court erred because the inclusion of commissions to McDowell and the Title Company in the option

price is a fraud on plaintiff government, even though known to Valliant, and the government is not estopped.

11. The Court erred in not holding said option agreement to be fraudulent and void as to plaintiff government, because it included, unknown to Valliant or plaintiff, compensation for other things than the land, such as lost profits, allowances to tenants, payment for personal property, allowance for documentary stamps, recorder's fees and commissions on commissions.

12. The Court erred in failing to find that the option agreement is so improvident that it ought not to be enforced against the government.

13. The option agreement was never executed because there was no meeting of the minds by the land owners, defendants, and the plaintiff government.

14. The Court erred in holding that the consideration recited in the option was the reasonable market value of the land, or, if it did not so hold, then in holding the plaintiff is authorized or required to pay more than the reasonable market value of the land.

15. The Court erred in holding the option agreement was ever executed by plaintiff, because the evidence shows that the only officer purporting to act on behalf of the plaintiff government in executing the same, did not exercise any discretion or judgment as to whether the option [fol. 947] price as recommended by McDowell was the fair, reasonable price of the land; made no investigation; had no knowledge of the land value, except the recommendation of McDowell, and only examined the form of the option, and if in due form, he signed it. Said so signing was purely an arbitrary act and was not an act of the executive branch of the government, but was no act at all, and the Court erred in failing to find that said so signing was an arbitrary act.

16. The Court erred in holding that the plaintiff government was estopped and was not acting in its sovereign capacity.

17. The Court erred in holding that the option agreement is valid and that the compensation should be fixed, or was by the Court fixed, at $12,000.00.

18. The Court erred in over looking and failing to follow the express requirement of the Statutes of Missouri; (R. S. 1939, Sec. 1506); and Section 21 of Article 2 of the Missouri Constitution) which is mandatory and provides the only method that can be legally followed and requires that the compensation in condemnation shall be determined by Commissioners.

19. The Court erred in failing to find that Valliant, who purported to act on behalf of plaintiff, did not have authority to accept on behalf of plaintiff said option.

20. The Court erred in finding that the Kansas City Title Company was the Agent of plaintiff and in finding said Company to be the Agent of plaintiff in accepting any deed to the property herein condemned.

21. The Court erred in finding that the option price of $12,000.00 did not include the amount the defendants asked for said land, plus McDowell's fee of 5% and the Kansas City Title Company's fee of 1½%, and the stamp tax and the recording fee, and in finding that the option price was not excessive, inflated and far higher than the fair value of the land, and in finding that it was not unreasonably excessive, and in finding that the plaintiff government contemplated, carried out or approved a plan that the price for which options would be taken should not only include the value of the land, but also the fee of McDowell and of the examiner and the cost of revenue stamps and the fee for recording conveyances and other expenses, and erred in finding that the plaintiff government, under the law, could do so.

22. The Court erred in construing the Act of July 2, 1940 to not control the method of fixing the compensation herein.

[fol. 948] 23. The Court erred in failing to find that the option agreement was void on its face because it provided that McDowell was to be paid a commission of 5% of the option price and therefore it was contrary to the prohibition against "cost-plus-a-percentage-of-cost system of contracting" contained in Public Law No. 703 (54 Stat. 712).

24. The Court erred in failing to find that the defendants and McDowell conspired to cause, and did cause to be included in the option price of the land not only the reasonable value of said land as represented by the defendants, but in addition thereto the 5% commission to be received by McDowell so that said option agreement as it was treated and acted upon by said defendants and said McDowell was void because it was contrary to the prohibition against the "cost-plus-a-percentage-of-cost system of contracting" contained in Public Law No. 703 (54 Stat. 712).

25. The Court erred in failing to find that the defendants and McDowell conspired to cause, and did cause to be included in the option price of the land not only the reasonable value of said land as represented by the defendants, but in addition thereto the 5% commission to be received by McDowell so that the transaction was entirely null and void because it was in violation of the express terms of the option agreement which provided that the 5% commission to said McDowell was to be paid by said defendants.

26. The Court erred in holding that the plaintiff "with full knowledge ratified the agent's acts by accepting the fruits of the contract" (the Government cannot ratify an illegal agreement), and erred in holding that the plaintiff acquired under said option any right that plaintiff did not theretofore have to take said lands.

27. The Court erred in holding that because the option was for acquiring land for national defense it was, therefore, legal, and erred in holding that for it to be illegal the subject matter or purpose of the agreement must be illegal and in excluding from the class of illegal agreements those where, as in this case, the methods employed in procuring it are illegal.

(s) HARRY C. BLANTON,
United States Attorney.

(s) RUSSELL VANDIVORT,
Assistant United States Attorney.

(s) DRAKE WATSON,
Special Assistant United States Attorney.

[fol. 949] (Decree.)

In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
No. 874. vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, William M. Andrews, et al., Defendants.

Decree.

(Filed November 5, 1942.)

This cause having been previously tried, the evidence for both plaintiff and defendants having been offered and the cause having been taken under advisement by the Court, and the Court having considered the evidence and the briefs of counsel filed in this cause and being now fully advised in the premises, it is ordered, adjudged and decreed by the Court that defendants' motion to strike out the Second Amended Reply of the plaintiff to the defendants' Amended Answer be and the same is hereby overruled.

It is further ordered, adjudged and decreed that all the following described land:

Certain land situated in the County of St. Charles, Missouri, known as Tract No. 19, and more particularly described as follows:

Lot No. Four (4) being part of U. S. Survey No. 887 and part of the Northwest Quarter of Section 26 of Township 46 North, Range 2 East, described and bounded as follows: Beginning at the Northwest corner of said lot, this being also the Northwestern corner of U. S. Survey No. 887, thence along the northern line of said U. S. Survey, which is also along a county road, North 80 degrees East 21.78 chains to corner from which a White Oak 30 inches in diameter bears South 60 degrees East 39 links and a White Oak 30 inches in diameter bears South 47½ degrees West 57 links, thence South 10 degrees East 29.75 chains to corner from which a White Oak 8 inches in diameter bears North [fol. 950] 67½ East 49 links and a Black Oak 10 inches in diameter bears North 62½ degrees West 20 links, thence South 83 degrees West 13.64 chains to corner from which a

Hickory 6 inches in diameter bears South 23 degrees West 17 links and a Hickory 4 inches in diameter bears North 9 degrees East 25 links, thence South 23.40 chains to corner from which a Hickory 9 inches in diameter bears North 31¼ degrees West 19 links and a Hickory 12 inches in diameter bears South 62 degrees West 60 links, thence West 13 chains to corner a stake near a stump; thence North 25.64 chains to corner on Morris line from which corner a post oak 10 inches in diameter bears South 14½ degrees West 54 links, and a Black Oak 5 inches in diameter bears South 39½ degrees East 43 links, thence East 4.14 chains to Morris Southeast corner from which a Hickory 10 inches in diameter bears North 43 degrees West 50 links, thence North 10 degrees West 25 chains to place of beginning, containing 94.46 acres, more or less; subject to all existing highway and public utility easements, but including the fee underlying such existing easements.

be condemned for the use and benefit of plaintiff herein, and that plaintiff have judgment in condemnation against each and all of the defendants herein jointly and severally as their rights may appear, and that the fee simple title to all of said land is hereby adjudged to be divested out of said defendants and each of them and vested absolutely in the plaintiff subject to all existing highway and public utility easements but including the fee underlying such existing easements.

It is further adjudged and decreed that the contract pleaded in the Amended Answer of the defendants is a lawful, valid and binding agreement providing for the amount of the compensation for the land hereinabove described and that the compensation fixed in the above mentioned condemnation should be fixed pursuant to the terms of said contract and that the appointment of commissioners should be dispensed with, and it is so ordered.

It is further adjudged and decreed that pursuant to the terms of said contract defendants are entitled to the sum of Twelve Thousand Dollars ($12,000.00), which is the amount agreed upon in said contract; and it appearing [fol. 951] to the Court from the evidence herein that on the 15th day of April, 1941, at the time of the institution of this suit, the plaintiff filed a notice of taking and paid into

the the Registry of this Court the sum of Three Thousand, Four Hundred and Sixty Dollars ($3,460.00) as the estimated value of the land hereinabove described, the plaintiff is now ordered to pay into the Registry of this Court the sum of Two Hundred and Sixty Dollars ($260.00), which is the amount of interest at Six Percent (6%) on said sum of Twelve Thousand Dollars ($12,000.00) from the 5th day of December, 1940, (which the evidence shows to be the date on which defendants surrendered possession of said land to plaintiff) to said 15th day of April, 1941, and the sum of Eight Thousand, Five Hundred and Forty Dollars ($8,540.00), which is the difference between the sum heretofore deposited, as aforesaid, by plaintiff and the amount herein awarded to plaintiff pursuant to said contract, together with interest on said sum of Eight Thousand Five Hundred and Forty Dollars ($8,540.00) from the 15th day of April, 1941, to the date of payment of said amount.

GEORGE H. MOORE,
United States District Judge.

[fol. 952] (Order Overruling Motion of Plaintiff for New Trial.)

No. 874.

Memorandum For Clerk.

(Filed November 10, 1942.)

Motion of Plaintiff for a new trial overruled.

/s/ GEO. H. MOORE,
U. S. District Judge.

[fol. 953] United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Motion of Plaintiff for the Transmission of the Original Exhibits to the Appellate Court.

(Filed December 19, 1942.)

Comes now the appellant, United States of America, by Harry C. Blanton, United States Attorney, Russell Vandi-

vort, Assistant United States Attorney, and Drake Watson, Special Assistant United States Attorney, and moves the Court for an order directing the Clerk of this Court to transmit all the original exhibits in the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, together with the transcript on appeal herein; that some of the exhibits consist of large plats which would be most difficult and expensive to reproduce, as well as of many reports, documents, letters, and other data which would be inordinately expensive to reproduce.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

DRAKE WATSON,
Special Assistant United States Attorney.

[fol. 954] In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Order for Transmission of Original Exhibits to the Appellate Court.

The motion of the appellant for an Order directing the Clerk of this Court to transmit to the Circuit Court of Appeals for the Eighth Circuit the original exhibits in the above entitled cause, coming on to be heard, and the Court being fully advised in the premises;

It is hereby Ordered that the Clerk of this Court be, and he is hereby authorized and directed to transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, together with the transcript of record on appeal herein, all of the original exhibits introduced at

the trial of this cause, with instructions to said Clerk of the said Circuit Court of Appeals to return said exhibits to this Court upon the rendition of the final decision in said Circuit Court of Appeals.

GEO. H. MOORE,
United States District Judge.

[fol. 955] United States of America, Plaintiff,
Docket No. 874. vs. At Law. Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Statement of Points to be Relied Upon by the Appellant.

(Filed December 19, 1942.)

The appellant, United States of America, pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, makes the following statement of points upon which it intends to rely upon appeal.

1. That the Court erred in each of its Findings of Fact and Conclusions of Law.

2. That the Court erred in overruling plaintiff's motion for a new trial.

3. That the Court erred in sustaining the validity of the alleged option contract, and in ordering judgment in favor of the defendant-property owners, in accordance with the terms of said alleged option contract.

4. That the Court erred in allowing the defendant-owner interest in addition to the amount set up in the option contract.

5. That the Court erred in refusing to set aside the alleged option contract and in enforcing said contract, rather than appoint commissioners to assess damages.

[fol. 956] 6. That the Court erred in rejecting certain competent, material, and relevant evidence offered by the plaintiff.

7. That the Court erred in admitting incompetent, immaterial and irrelevant evidence offered by the defendant-owners.

HARRY C. BLANTON,
United States Attorney.

RUSSELL VANDIVORT,
Assistant United States Attorney.

DRAKE WATSON,
Special Assistant United States Attorney.

Copy of the above Appellant's Statement of Points mailed to counsel of record for defendant-property-owner this 19th day of December, 1942.

HARRY C. BLANTON,
United States Attorney.

[fol. 957] (Docket Entries in District Court.)

United States of America, Plaintiff,
Case No. 874. vs.
Certain land situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

4-15-41 Motion of plaintiff for leave to file petition in condemnation and for order for summons filed, presented and granted in order filed and entered; petition in condemnation filed and summons issued directed to defendants returnable June 9, 1941; on oral motion of plaintiff order filed and entered on declaration of taking filed April 14, 1941, in Cause No. 854, vesting fee simple title in plaintiff as to Tract No. 19 herein and directing delivery of immediate possession to plaintiff; order filed and entered directing notice be given defendants of judgment on declaration of taking and of requirement for delivery of immediate possession to plaintiff; on oral motion of U. S. Attorney, order filed and entered directing the transfer of $3,460. to this

cause for the use and benefit of defendants entitled thereto from the sum heretofore paid into the registry by plaintiff under the said declaration of taking filed in Cause No. 854, the aforesaid sum being the estimated compensation for said tract No. 19 herein.

6-2-41 Answer of defendants Wm. M. Andrews and Bertha L. Andrews to plaintiff's petition, filed.

6-7-41 Marshal's return of service to summons filed (executed)

6-9-41 Order filed and entered continuing cause to June 16, 1941.

6-11-41 On oral application, plaintiff granted 30 days from date in which to plead to answer filed herein by defendants Wm. M. and Bertha L. Andrews.

6-12-41 Motion of plaintiff for leave to amend petition by adding additional defendants and for issuance of summons and notice to such newly joined defendants, returnable July 7, 1941, filed, presented and granted in order filed and entered.

6-16-41 On motion of U. S. Attorney, order filed and entered continuing cause to July 7th, 1941.

7-7-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to Sept. 15, 1941.

[fol. 958]

7-7-41 Marshal's return of service to summons, filed (executed)

9-15-41 On motion of U. S. Attorney, order filed and entered continuing case to Oct. 14, 1941, Division No. 2.

9-18-41 Case set for hearing on Monday, Dec. 15, 1941.

10-14-41 On oral motion of U. S. Attorney, order filed and entered continuing cause to Dec. 15, 1941.

11-25-41 Reply of plaintiff to separate answer of defendants William M. and Bertha L. Andrews filed by leave.

11-27-41 Praecipe for subpoena filed and issued to Lt. Baird.

11-28-41 Notice of presentation on November 29, 1941 of application of U. S. of A. for a commission to take depositions filed by plaintiff.

11-29-41 Application of plaintiff for commission to take deposition on interrogatories and application to shorten time for taking same, filed, heard, argued, submitted and denied.

11-29-41 Marshal's return of service to notice of application for commission to take deposition, etc. filed (executed).

12-1-41 Praecipe for subpoena filed and issued to Paul E. Williams.

[12-1-41 Praecipe for subpoena filed and issued to Paul E. Williams.]

12-2-41 On motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to file attached exhibit "A" as an exhibit to plaintiff's reply herein, etc.

12-5-41 Marshal's return of service to subpoena filed (executed).

12-9-41 Praecipe for subpoena filed and issued to W. B. Whitlow.

12-9-41 Return of Marshal of West. Dist. of Mo. to service of subpoena filed (not executed).

12-9-41 Return of Marshal of Kansas to subpoena filed (executed).

12-10-41 Motion of defendants William M. and Bertha L. Andrews for continuance of cause set for trial on December 15, 1941, to January 26, 1942, or to some later date, filed by leave.

12-11-41 Motion of defendants William M. and Bertha L. Andrews to strike out plaintiff's reply to said defendants' answer filed by leave.

[fol. 959]

12-12-41 Motion of defendant William M. Andrews to require U. S. Attorney to exhibit to attorneys for defendant certain instruments in writing etc., for inspection and to permit making copies of the same for the use of movant in the preparation for trial of cause filed by leave.

12-15-41 Motion of defendants William M. and Bertha L. Andrews to strike out plaintiff's reply to said defendants' answer argued, submitted and ruling thereon reserved; on oral motion of U. S. Attorney order of Hon. Geo. H. Moore filed and entered continuing cause to March 16, 1942.

12-17-41 Return of Marshal of the West. Dist. of Mo. to service of subpoena filed (executed).

2-25-42 Praecipe for subpoena filed and issued to W. R. Dalton.

2-27-42 Amended answer of defendants William M. and Bertha L. Andrews to plaintiff's petition filed by leave.

2-27-42 Motion of defendants William M. and Bertha L. Andrews for an order on plaintiff to produce for inspection by counsel for defendant and for introduction as evidence on trial of proceedings, certain documents, etc., filed by leave.

3-5-42 On oral application, plaintiff granted leave to file herein on or before March 9th, its reply to the amended answer of defendants William M. and Bertha L. Andrews filed herein Feb. 27, 1942.

3-7-42 Reply of plaintiff to amended answer of defendants William M. and Bertha L. Andrews, filed.

3-10-42 On verified application of counsel for defendants William M. and Bertha L. Andrews, filed and presented, subpoena duces tecum ordered and issued directed to C. R. Dutton, Lt. Colonel, Ordnance Dept., Commanding Officer, Weldon Springs Ordnance Project, Weldon Springs, Mo. returnable March 16, 1942 at ten A. M.

3-13-42 Return of service to subpoena duces tecum (1) filed (executed).

3-16-42 On oral motion of U. S. Attorney, order filed and entered continuing cause to March 30, 1942.

3-17-42 Marshal's return of service to subpoena filed (executed).

3-21-42 Return of plaintiff to motion of defendants William M. and Bertha L. Andrews for an order on plaintiff to produce certain documents filed by leave; on oral motion of U. S. Attorney, order filed and entered granting plaintiff leave to file attached amendment to plaintiff's reply herein.

[fol. 960]

3-26-42 By leave, motion of defendants William M. and Bertha L. Andrews to strike plaintiff's reply to defendants' amended answer, filed.

3-28-42 Upon oral motion, order filed and entered granting plaintiff leave to amend reply to the amended answer of defendants, William M. Andrews and Bertha L. Andrews.

4-2-42 Cause passed to April 3, 1942.

4-2-42 Praecipe for subpoena filed and issued to Joe Schulte.

4-3-42 Plaintiff's amended reply to the amended answer of defendants William M. and Bertha L. Andrews to plaintiff's petition filed by leave. Parties announcing ready, trial of cause before the Court on the issues raised by plaintiff's petition in condemnation, the amended answer of defendants William M. and Bertha L. Andrews thereto and the amended reply of plaintiff to said answer is commenced and concluded and such issues submitted, on briefs to be hereafter presented, plaintiff granted to May 4, 1942 within which to submit brief; defendant until May 15, 1942 within which to submit answering brief, and plaintiff to May 20, 1942 within which to submit reply brief.

[fol. 726] (Order Denying Petition of Appellees for Rehearing in Cause No. 12561.)

January Term, 1944.

Friday, January 14, 1944.

The petition for rehearing filed by counsel for appellees in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

January 14, 1944.

In The United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

Nos. 12,561 and 12,562.
Civil.

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS,
Appellees.

Appeals from the District Court of the United States for the Eastern District of Missouri.

PETITION OF APPELLEES WILLIAM M. ANDREWS AND BERTHA L. ANDREWS FOR A REHEARING

Come now the appellees William M. Andrews and Bertha L. Andrews, within fifteen days after the filing of the opinion and decision of the Court in this cause, and respectfully move and petition the Court to grant them a rehearing of said cause for the reasons following, to wit:

I.

The Court, on pages 3 and 4 of its printed opinion, holds that the plan of acquisition as embodied in the written proposal of McDowell and accepted by the Quartermaster Department as supplemented by the form of option contract attached thereto and made a part thereof, to the effect that the commission was "to be paid by the vendor," differed from the actual plan put into operation in some cases shown by the record, which plan the Court holds was that McDowell should obtain a price from the landowner which he would be willing to recommend to the Department for approval, that the landowner should then be allowed to add an additional 5 per cent as commission, and that the total should be inserted as the gross sale figure. In so holding the Court overlooked the necessary inference from the following provision in the agreement between McDowell and the Quartermaster Department: "For all services hereunder the compensation of the optioner shall consist solely of 5 per cent commission in each purchase, to be paid by the vendor, as more specifically set forth in the option form," which said inference is that the 5 per cent commission to be paid by the landowner, being for services rendered to the Government by McDowell under his contract with the Department, was by the very terms of said last mentioned contract to be passed on to the Government by the inclusion of same in the gross sale price. In view of this inference, the actual plan put into operation in such cases was exactly the same as the plan embodied in the agreement between McDowell and the Quartermaster Department as supplemented by the attached option form. It was the prerogative of the landowner and not of McDowell to fix the price at which he would sell, and any prudent person in so doing under such circumstances would take into consideration the expenses of the sale, and did not, in so doing, violate the plan of acquisition.

II.

The Court, in holding in the last paragraph on page 6 of its printed opinion, "that purchases of real estate which allow the landowner to fix his wanted price and then add a certain percentage of this amount for some special purpose, all to be paid to him solely as consideration for the conveyance literally, may be regarded as constituting cost-plus-a-percentage-of-the-cost transactions there can be no doubt," entirely overlooked the contention on pages 29, 30 and 31 of appellees' brief that Title 50, Section 171, permits the owner to fix his price and places no limitation whatsoever on him in so doing, but limits the power of the Secretary of War only. Furthermore, if the Court is right in so holding, all real estate purchases consummated in recent years have been cost-plus-a-percentage-of-the-cost transactions, for the reason that the law in recent years requires that the vendor place revenue stamps on the deed. The price of these stamps is a percentage of the price of the land, and the vendor has taken that price as well as other expenses of the sale into consideration in fixing his price. As a matter of fact, the word "**system**" used by the National Defense Act of July 2, 1940, in its cost-plus prohibition logically limits the prohibition to the then known system of cost-plus-a-percentage contracting and precludes the idea of bringing every instance in which there is a cost item and a plus item within the terms of the prohibition.

At the time of the passage of the Act of July 2, 1940, the terms "cost-plus-a-percentage-of-the-cost" and "cost-plus-a-fixed-fee" both had a definitely established meaning known to Congress and known to the War Department and public contractors largely as a result of the first World War. The essence of the cost-plus-a-percentage system was that the Government committed itself in advance by binding obligation to pay an amount not specified in

the contract and incapable of ascertainment at the time of entrance into the contract. The cost-plus systems of contracting were very fully discussed in the opinion of the Court in Crowe v. Boyle (cited on page 59 of appellees' brief), 193 Pac. 111, l. c. 118 and 119, in that portion of said opinion in which the Court quotes at length from discussions by well-known authorities on the subject, such as Earnest W. Clarke in his paper presented to the American Society of Engineers, printed in Vols. 45 and 46, pages 443 to 449, of the proceedings of the society, and also Mr. A. E. Wells in his article on the subject in the Heating & Ventilating Magazine for October, 1919, Vol. 16, p. 27, and also General R. C. Marshall, then Chief of the Construction Division of the War Department, in an address given before the Associated General Contractors of America November 21, 1918.

III.

The Court, in arriving at the holding, embodied in the last hereinabove quotation from the opinion, has overlooked the proposition of law that the National Defense Act of July 2, 1940, is an act giving powers to and limiting the powers of the Secretary of War, but does not purport to limit the powers of landowners in their methods of fixing their prices in offers to sell their land to the United States Government for military purposes, and the landowner was therefore not violating the act when he considered the expenses of the sale in arriving at the gross sale price.

IV.

The Court, in making the holding embodied in the last hereinabove quotation from the opinion, overlooked the fact that if any landowner fixed his wanted price and then added a certain percentage of this amount for some special purpose and then offered to sell his land to the Government for the total of said amounts, this was a mere

offer on the part of the landowner and was not then a contract and did not become a contract or become binding on the Government unless and until the Secretary of War or his duly constituted contracting officer duly accepted said offer after determining that said price was reasonable; and in so holding the Court overlooked the presumption of law to the effect that in any case in which the Secretary of War or his contracting officer did so accept such an offer, he did so after forming the opinion that the total gross price named therein was reasonable, which said presumption of law arises from the holding of the Court in footnote No. 5 of the opinion on page 5 thereof, that there is no question as to the actual good faith of the Quartermaster Department in the matter, together with the fact of his plain statutory duty under Title 50, Section 171, not to purchase unless he considered the offered price reasonable.

V.

The Court, in arriving at the holding embodied in the last hereinabove quoted portion of the opinion, overlooked the fact that 5 per cent or any other per cent of any fixed net wanted price was a fixed amount and not an indefinite amount and, as such, if indeed it amounted to any kind of a cost plus, was specifically authorized by the National Defense Act of July 2, 1940, which specifically authorized the cost-plus-a-fixed-fee system of contracting.

VI.

The Court, in arriving at the holding embodied in the last hereinabove quoted portion of the opinion, overlooked appellees' contention in their brief, in point XVI-a, pages 27 and 28, and in their argument contained in the second paragraph on page 62 of their brief, that contracts under the cost-plus-a-percentage-of-the-cost system of contracting, as that system was known by Congress, always guar-

anteed payment to the contractor of his cost, plus a percentage of the cost, whereas, payment of McDowell's cost of acquisition in the Weldon Spring project was in no wise guaranteed, and under the plan he was to receive no compensation whatever unless the option contract price should be paid, and even then he was not to be reimbursed for his costs of acquisition theretofore expended, as is the contractor always under the cost-plus-a-percentage-of-the-cost system of contracting.

VII.

The Court, in arriving at the holding set forth in the last hereinabove quoted portion of the opinion, overlooked the contention of appellees in their brief, on page 63 thereof, to the effect that in all contracts under the cost-plus-a-percentage-of-the-cost system of contracting, the Government agrees unreservedly that the cost shall be incurred and paid by the Government and that in addition thereto a percentage thereof shall be paid as compensation, whereas, under the Weldon Spring plan the Government reserved the right to take up or reject any option submitted to it thereby failing to agree that the price named in any given option submitted by him would be paid.

VIII.

The Court, in arriving at the holding set forth in the last hereinabove quoted portion of the opinion, overlooked the contention of appellees on page 58 of their brief to the effect that in all contracts under the cost-plus-a-percentage-of-the-cost system of contracting the owner agrees in advance to pay the then **unknown** cost plus a percentage of the **then unknown cost** and is bound by the contract, although the cost remains indefinite and uncertain, whereas under the Weldon Spring plan the Government did not purport to be bound by the contract before it definitely

knew the price of the land in each transaction and before it definitely knew the amount of McDowell's compensation in each transaction.

IX.

The Court, in citing in the opinion instances in the record as to various alleged considerations entering into the mind of McDowell in arriving at his recommendations made to the Quartermaster General's Department as being indicative of the evils said to be inherent in the plan of acquisition used in the Weldon Spring project, entirely overlooked the contention of appellees in their brief that the fixing of the price was the sole prerogative of the vendor and the acceptance of the land at the price fixed was the sole prerogative of the Secretary of War or his contracting officer, and that McDowell's recommendations were therefore immaterial; and further overlooked the presumption of law arising from the Court's finding in footnote No. 5 on page 5 of its opinion that there is no question as to the good faith of the Quartermaster Department, which said presumption of law is to the effect that the contracting officer did his full and complete duty, and in cases of acceptance formed an opinion that the prices submitted were reasonable; and in so citing such instances for said purpose the Court further overlooked the contention of appellees in their brief that in the absence of evidence of bad faith (which bad faith the Court holds was absent in the Quartermaster Department) the discretionary acts of administrative officers are not subject to judicial review; and in so citing such instances for such purpose, the Court further overlooked a necessary inference from its finding of fact in the last few lines of the first paragraph on page 9 of its opinion to the effect that the particular elements fused by McDowell in the real estate values recommended by him in any specific transactions such as those mentioned on page 9 of the opinion were not known to the Quarter-

master Department at the time the contracts were approved, said inference being that if McDowell did consider any improper matters in arriving at his recommendations, those improper matters did not influence the Quartermaster Department because of its lack of knowledge thereof, and that Department having acted in good faith, as found by the opinion in footnote No. 5, is presumed to have formed its opinion honestly, intelligently and efficiently, and its discretionary acts in approving the options are not subject to judicial review.

X.

The holding of the Court on page 12 of its opinion that it taxes judicial credulity, ignores plain reality and overrides inescapable conviction to say that the evidence does not show that McDowell's 5 per cent was added into the option price in the Andrews case in arriving at the gross sales price apparently failed to take into account the fact referred to in point 8 on page 22 of appellees' brief, and set forth on pages 549, 550 and 554 of the record, being set forth in the testimony of Mr. Andrews on said pages of the record as follows: "We signed an option of $150.00 an acre and Mr. Williams said he would submit it and he did. Some day or so later, I do not remember the exact time that transpired, he called us up and told us that the contract could not be and would not be approved and asked us for another appointment to discuss the matter further. We gave him another appointment and he came out to the house some time later and we discussed it at length. My wife and I, of course, had discussed it together, and we set another figure at $125.00 an acre, which we signed an option on it at that figure and sent it to Mr. McDowell and it went through the War Department." Which testimony by Mr. Andrews appellees contended on page 39 of their brief overcomes any inference that Mr.

and Mrs. Andrews, in fixing their price, engaged in the mental process of adding commissions, fees and other expenses of the sale to a net price in arriving at their price.

XI.

In its opinion this Court has overlooked the contention of these appellees set forth under their "Points and Authorities" under point XVIII on pages 27 and 28 of their brief, and under their "Argument" on pages 67 and 68, and the authorities cited under said point which, in conjunction with the facts shown in this case in the lower court, clearly establish ratification of the contract by the Government by its acts after being fully apprised of all of the facts pertaining to the negotiation and execution of said contract, and therefore the Government ought not to be allowed to avoid said contract.

XII.

The Court, in finding on page 15 of its opinion that the landowners were as much charged with knowledge of the alleged congressional prohibition and their alleged lack of right to become a party to the use of such a contracting method as was the Quartermaster Department, has failed to take into consideration the fact that departmental officers may be presumed to be more familiar with their powers and duties and with the laws pertaining thereto than ordinary citizens, and the fact that there is a presumption of law, argued and supported by citations of authority on page 51 of appellees' brief to the effect that "no official person, acting under oath of office, will do aught which is against his official duty to do, or will omit to do aught which his official duty requires should be done." And the further fact that even the Secretary of War assured them by telegram that they should co-operate in the plan. As a matter of fact, the record shows that the War Depart-

ment itself determined that the plan of acquisition here involved did not violate the cost-plus prohibition of the Act of July 2, 1940, and when the War Department and two Judges of the United States District Court and also the United States Circuit Court of Appeals for the Seventh Circuit hold that this plan of acquisition was not violative of the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, it is difficult to see how an ordinary citizen could in law be charged with knowledge that it was violative of said prohibition.

XIII.

The finding of the Court on page 15 of its opinion to the effect that the way is open to the landowners to receive the actual value of their property in condemnation proceedings and that is all to which they are in law entitled, ignores the fact that the War Department induced the landowners to surrender immediate possession in consideration of promises of definite amounts of money and then after they had sold their personal property at a sacrifice made necessary by haste and suffered all other hardships incident to surrender of immediate possession, the War Department enjoying a much earlier possession than it could have obtained by condemnation, repudiated its promise to pay and sought to have the amount of compensation determined in a forum where the measure of compensation is market value only and where the value of surrender of immediate possession is not to be considered. Citizens so treated feel that a Department of the Government has played fast and loose with them. Furthermore, they felt that they were entitled to rely upon their contracts and did not have the money to provide scientific appraisals of their property. Meanwhile, the surface of the earth has been changed; buildings have been destroyed, and landmarks have been obliterated. It will be impossible for the land value question to be fairly tried.

Conclusion.

By way of summary and in conclusion, we submit that the Weldon Spring contracts were not cost-plus contracts of any kind but were merely contracts for the sale of land. They lacked the essential characteristics of either of the known systems of cost-plus contracting. They did not bind the Government to pay a sum of money which was indeterminable at the time of the creation of the obligations as contracts under either of the cost-plus systems always do. They did not guarantee to a contractor the payment of his expenses as contracts under either of the cost-plus systems always do. On the contrary, they provided for the payment of a definite and fixed sum by the Government, said sum being the agreed upon sale price of the real estate, as contracts under either of the cost-plus systems of contracting never do, and they provided for the payment of a fixed sum out of the sale price as commission to a solicitor. The contracts are not cost-plus contracts but they are fixed-fee contracts, and being fixed-fee contracts they would not violate the congressional prohibition in the Act of July 2, 1940, even if they did fall into the cost-plus class for the reason that cost-plus-a-fixed-fee contracts are specifically authorized by the statute.

We suggest that if the Government had contracted with McDowell to buy the land himself and had at the same time agreed to buy it from him at the price which he paid for it plus 5 per cent, that would have been a cost-plus contract; but such was not the arrangement. McDowell had no power to buy the land but was a mere negotiator and the Government had specifically reserved the right to reject the negotiated options, in which event McDowell was to get no compensation.

We submit further that the mental processes engaged in by the landowners in fixing their prices are not material, and that the acceptance of those prices by the contract-

ing officer was a discretionary act not subject to judicial review.

We submit that no inferences unfavorable to the landowners logically flow from the fact that McDowell did not testify in the court below. He was in the court room under Government subpoena and the Government could have placed him on the witness stand. He was a Government representative and the landowners did not feel that it was incumbent on them to place him on the stand.

We further submit that as a matter of fact, the War Department did not violate the cost-plus prohibition in the National Defense Act and that far-reaching consequences may flow from holding that it did, in view of the fact that it purchased land under the identical plan in eight different projects and expended millions of dollars in the same kind of transactions.

As noted by the opinion in footnote No. 12, the United States Circuit Court of Appeals for the Seventh Circuit has held the same kind of a contract valid. The divergence of opinion between the holding of that Court and this one tends to create confusion as to the law. We respectfully submit that the majority opinion in that case correctly construed the law.

Wherefore, appellees respectfully pray that a rehearing of this cause be granted and that upon such rehearing an affirmance of the judgment be accorded.

Respectfully submitted,

SAMUEL M. WATSON,
WEBSTER KARRENBROCK,
REDICK O'BRYAN,
Attorneys for Appellees William M. Andrews and Bertha L. Andrews.

Certificate.

Samuel M. Watson, one of the attorneys for appellees, ıereby certifies that the foregoing petition for rehearing s not made for the purpose of delay, but is filed in good aith and is believed to be meritorious.

Samuel M. Watson,
Attorney for Appellees William M.
Andrews and Bertha L. Andrews.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 5, 1944.

[fol. 740] (Order Denying Petition of Appellees for Rehearing in Cause No. 12562.)

January Term, 1944.

Friday, January 14, 1944.

The petition for rehearing filed by counsel for appellees in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

January 14, 1944.

[fol. 741] (Motions of Appellees for Stay of Issuance of Mandate in Cause No. 12561.)

Come now James Karl Muschany and Vera Muschany, appellees in the above entitled cause and respectfully show to the Court that the judgment of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri was reversed by this Court on or about the 22nd day of December, 1943, that within proper time and on January 5, 1944, appellees filed their motion for a rehearing of said cause, which motion was overruled by this Court on the 14th day of January, 1944.

These appellees respectfully represent to the Court that they are aggrieved by the decision and order of this Court in this cause and that they intend to apply to the Supreme Court of the United States for the issuance of a writ of certiorari addressed to this Court in said cause for the purpose of having said Supreme Court of the United States review this Court's record and decision herein.

Wherefore, these appellees respectfully pray the Court to enter an order staying and withholding the mandate in this cause and staying further proceedings herein until thirty days from this date.

Respectfully submitted,

WM. R. GENTRY,
Attorneys for Appellees, James Karl Muschany and Vera Muschany.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 24, 1944.

[fol. 742] (Order Staying Issuance of Mandate in Cause No. 12561.)

January Term, 1944.

Tuesday, January 25, 1944.

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 25, 1944.

[fol. 743] (Petition of Appellees for Stay of Issuance of Mandate in Cause No. 12,562.)

Come now appellees in the above entitled cause and respectfully show unto the court

That on December 22, 1943, this court entered and recorded its decision reversing the decree of the District Court herein; and

That thereafter these appellees filed herein their Petition for Rehearing, and

That thereafter, on the 14th day of January, 1944, this court overruled said Petition for Rehearing; and

That appellees are aggrieved in the premises and are desirous of a review by the United States Supreme Court of the decision of this court.

Wherefore, appellees respectfully pray the court to stay the mandate in this cause for thirty (30) days to enable appellees to apply in accordance with the statutes of the United States and the rules of this Court and of the Supreme Court of the United States in such cases made and

provided to the Supreme Court for a writ of certiorari to review the decision of this Court in this cause.

Respectfully submitted,

SAMUEL M. WATSON,
Of Counsel for Appellees.

St. Louis, Missouri, January 24, 1944.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 24, 1944.

[fol. 744] (Order Staying Issuance of Mandate in Cause No. 12562.)

January Term, 1944.

Tuesday, January 25, 1944.

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 25, 1944.

[fol. 745] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record

entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein the United States of America was Appellant and James Karl Muschany and Vera Muschany were Appellees, No. 12561, and wherein the United States of America was Appellant and William M. Andrews and Bertha L. Andrews were Appellees, No. 12562, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 28th day of January, A. D., 1944.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[fol. 745] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 31

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 746] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 32

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

4-18-42 By leave of Court, motion of defendants William M. and Bertha L. Andrews to strike plaintiff's amended reply to said defendants' amended answer, as well as motion of said defendants to strike testimony introduced by plaintiff, upon hearing for the purpose of showing fraud, conspiracy and value of land, filed.

4-29-42 Upon oral application, Messrs. James E. Carroll, Richmond C. Coburn, William R. Gentry, Richard D. Fitzgibbon and Robert Niedner granted leave to file amicus curiae brief in this cause.

6-5-42 Upon motion of plaintiff filed and presented, order filed and entered granting plaintiff leave to amend petition relative to land description.

6-11-42 Upon oral motion of U. S. Attorney order filed and entered jointly in Cases 765, 874, and 807 granting plaintiff to and including June 27, 1942 within which to file reply brief in said causes.

7-6-42 Memorandum opinion of the Court on the issues raised by the pleadings of the parties, adopting the memorandum opinion of Hon. Charles B. Davis filed this day in Cause No. 807 filed herein, finding plaintiff entitled to condemn the land in question and to judgment in condemnation, as well as finding option contract a valid agreement and that the appointment of commissioners should be dispensed with, and that the compensation should be fixed at $12000.00, the amount agreed upon in the option contract; judgment accordingly to be tendered for approval, signature and entry.

[fol. 961]

7-6-42 Cards mailed to Reddick O'Bryan and Samuel Watson; Messrs. Niedner and Fitzgibbons and Igoe, Carroll, Keefe and Coburn; and Harry C. Blanton, Esq., notifying of memorandum opinion of the Court for judgment as to option contract.

7-9-42 Motion of plaintiff for a new trial filed.

9-10-42 Notice of attorney for plaintiff to docket motion of plaintiff for new trial, filed.

9-18-42 Notice to docket for hearing motion of plaintiff for a new trial, filed.

9-28-42 Motion of plaintiff for a new trial submitted by agreement.

11-5-42 Decree filed and entered overruling motion of defendants to strike out second amended reply of plaintiff to defendants' amended answer; adjudging fee simple title to land described therein to be vested absolutely in plaintiff subject to existing easements etc.; decreeing that option contract pleaded in defendant's amended answer is a valid and binding agreement, dispensing with appointment of commissioners etc. and adjudging defendants to be entitled to the sum of $12,000.00 the amount agreed upon in said option contract, and directing plaintiff to pay into the Registry the deficiency of $8,540.00, together with certain interest etc.

11-10-42 Cards mailed to U. S. Att'y. and Samuel M. Watson, Att'y. for defts. notifying of the overruling of motion of plaintiff for a new trial.

11-10-42 Motion of plaintiff for a new trial overruled.

12-18-42 Notice of appeal to the U. S. C. C. A., 8th Circuit, of the United States of America, plaintiff herein, from the final judgment entered in this cause Nov. 5, 1942 and from the order entered Nov. 10, 1942 overruling plaintiff's motion for a new trial, filed.

12-19-42 Plaintiff's statement of points upon which it will rely upon its appeal herein filed.

12-19-42 Motion of plaintiff for the transmission of the original exhibits to the Appellate Court on its appeal herein filed, presented and granted in order filed and entered.

12-19-42 Stipulation of parties for joint transcript of the record on the appeals of plaintiff filed. Plaintiff's designation of the contents of the record and proceedings to be included in joint transcript on appeal.

12-21-42 Certificate of Clerk as to mailing of notice to parties in interest of appeal of plaintiff from final judgment entered November 5, 1942 filed.

[fol. 962]

12-22-42 Order filed and entered extending time of plaintiff to and including March 18, 1943 in which to file and lodge transcript of record on appeal in the U. S. C. C. A., 8th., Circuit.

[fol. 963] In the United States District Court, Eastern District of Missouri, Eastern Division.

United States of America, Plaintiff,
Docket No. 874 vs. At Law
Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Order Extending Time For Filing Transcript and Docketing Case.

(Filed December 22, 1942)

It appearing to the Court that a Notice of Appeal was filed herein on the 18th day of December, 1942 by the plaintiff, United States of America, of its intention to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from a final judgment entered herein on the 5th day of November, 1942 in this action, said judgment ascertaining, determining, adjudging, and fixing the sum of Twelve Thousand Dollars ($12,000.00) plus certain interest as full and complete just compensation which plaintiff is required to pay for the taking of the land designated in this cause as Tract No. 19 in the County of St. Charles, in the State of Missouri; and adjudging the option pleaded in this case as a valid binding obligation upon the plaintiff herein.

And it appearing to the Court that the time for the filing of the record on appeal and docketing the action on appeal will expire on or about January 27, 1943;

And it further appearing to the Court that the reporter's transcript of the evidence taken at said trial is voluminous, [fol. 964] and that it will require more than the said forty (40) days to perfect said appeal;

It Is, Therefore, Ordered by the Court that the time for filing the record on appeal and docketing the action on the appeal in this cause be, and the same is hereby, extended to and including the 18th day of March, 1943, said time being not more than ninety (90) days from the date of the said notice of appeal, and said notice of appeal being the first notice of appeal in said cause.

GEO. H. MOORE,
Judge, United States District Court for the Eastern District of Missouri, Eastern Division.

[fol. 965] In the United States District Court, Eastern District of Missouri, Eastern Division

United States of America, Plaintiff,
Docket No. 807 vs. At Law
Tract No. 24/233.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Defendants.

United States of America, Plaintiff,
Docket No. 874 vs. At Law
Tract No. 19.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al., Defendants.

Designation of the Record on Appeal.

(Filed February 17, 1943)

United States of America, Appellant in the above entitled causes, designates for inclusion in the joint trans-

cript of the record on appeal the pleadings, proceedings and evidence, as follows:

		Filed
1.	Stipulation for filing of joint record on appeal. (Case 807)	
2.	Petition in condemnation.	April 9, 1941
3.	Declaration of Taking, in Cause 771, omitting therefrom all names from the caption except the defendants James Karl Muschany and Vera Muschany, and omitting from the paragraph describing the parcels of land in said Declaration except Tract No. 24/233.	April 7, 1941

		Filed
[fol. 966] 4.	Order and Judgment vesting title in the plaintiff as to Tract No. 24/233 and for Order of Immediate Possession.	April 9, 1941
5.	Order directing transfer of $950.00 to this cause for use and benefit of defendants in this cause.	April 9, 1941
6.	Joint answer of defendants James Karl Muschany and Vera Muschany.	May 17, 1941
7.	Order granting plaintiff thirty days within which to plead to answer.	May 27, 1941

		Filed
8.	Second Amended Reply to answer of defendants, including Exhibit A attached thereto.	April 3, 1942

9.	Motion of defendant James Karl Muschany to strike out portions of Plaintiff's Reply to said defendant's answer. (Refiled after Plaintiff's First Amended Reply was filed.)	December 8, 1941
10.	Testimony and proceedings at the trial upon the issues raised by the answer of the defendants and by plaintiff's second amended reply and by defendants' motion to strike in this case, in Case 874 and in Case 765 (consolidated by stipulation).	
11.	Memorandum opinion of the Court, embodying Findings of Fact and Conclusions of Law and directing that the judgment be tendered for approval, signature and entry.	July 6, 1942
12.	Motion of plaintiff for new trial.	July 9, 1942
13.	Order of Court overruling motion for new trial.	September 21, 1942
14.	Decree filed and entered overruling motion of defendants to strike out parts of Plaintiff's Reply, adjudging fee simple title to land described therein to be vested absolutely in plaintiff, subject to existing easements, etc., decreeing that option contract pleaded in defendants' answer is valid and binding agreement, dispensing with appointment of commissioners, etc., and adjudging de-	October 12, 1942

fendants, pursuant to terms of said option contract, to be entitled to the sum of $4,500, the amount agreed upon in said option contract and directing plaintiff to pay
[fol. 967] into the Registry of the Court the deficiency of $3,550, together with certain interest.

		Filed
15.	Notice of appeal.	
16.	Motion and order for transmittal of original exhibits.	
17.	Appellant's statement of points.	
18.	Clerk's docket entries.	
	(Case 874)	
19.	Petition in condemnation.	April 15, 1941
20.	Declaration of Taking, in Cause 854, omitting therefrom all names from the caption except the defendants William M. Andrews and Bertha L. Andrews, and omitting from the paragraph describing the parcels of land in said Declaration except Tract No. 19.	April 15, 1941
21.	Order and Judgment vesting title in the plaintiff as to Tract No. 19 and for order of Immediate Possession.	April 15, 1941
22.	Order directing transfer of $3,460 to this cause for use and benefit of defendants in this cause.	April 15, 1941

23.	Answer of defendants William M. and Bertha L. Andrews.	June 2, 1941
24.	Amended answer of defendants William M. and Bertha L. Andrews to plaintiff's petition.	February 27, 1942
25.	Plaintiff's Amended Reply to Amended Answer of defendants, including Exhibit "A" attached thereto.	April 7, 1942
26.	Motion of defendants William M. and Bertha L. Andrews to strike Plaintiff's Amended Reply as well as to strike testimony introduced by plaintiff upon the hearing.	April 18, 1942
27.	Motion of defendant to require United States Attorney to exhibit to attorneys for defendants certain instruments for inspection, etc.	December 12, 1941

Filed

[fol. 968] 28.	Motion of defendants for an order on plaintiff to produce for inspection by counsel for defendants certain documents.	February 27, 1942
29.	Testimony and proceedings at trial upon the issues raised by the Amended Answer of the defendants, by Plaintiff's Amended Reply and by defendants' moto strike in this case, in Case 807 and in Case 765 (consolidated by Stipulation). (Clerk, however, will submit	

but one copy of the testimony and proceedings, etc., to be used in both cases.)

30. Memorandum opinion of the Court on the issues raised by the pleadings of the parties, adopting the memorandum opinion of Honorable Charles B. Davis filed this day in Cause 807 filed herein, finding plaintiff entitled to condemn the land in question and to judgment in condemnation, as well as finding option contract a valid agreement and that the appointment of commissioners should be dispensed with and that the compensation should be fixed at $12,000, the amount agreed upon in the option contract, judgment accordingly to be tendered for approval, signature and entry. — July 6, 1942

31. Motion of plaintiff for new trial. — July 9, 1942

32. Decree filed and entered overruling motion of defendants to strike out Second Amended Reply of plaintiff to defendants' Amended Answer, adjudging fee simple title to land described therein to be vested absolutely in plaintiff, subject to existing easements, etc., decreeing that option contract pleaded in defendants' Amended Answer is a valid and binding agreement, dispensing with appointment of commissioners and adjudging — November 5, 1942

defendants to be entitled to the sum of $12,000, the amount agreed upon in said option contract and directing plaintiff to pay into the Registry of the Court the deficiency of $8,540 together with certain interest, etc.

33. Order of Court overruling plaintiff's motion for a new trial. November 10, 1942

Filed

[fol. 969] 34. Notice of Appeal.

35. Motion and Order for transmittal of original exhibits.

36. Appellant's statement of points.

37. Clerk's docket entries.
(Cases 807 and 874)

38. This designation of the record.

39. All other pleadings and documents filed in connection with the appeals in the above-entitled causes.

HARRY C. BLANTON
United States Attorney.

RUSSELL VANDIVORT
Assistant United States Attorney.

DRAKE WATSON,
Special Assistant U. S. Attorney.

[fol. 970] Clerk's Certificate:

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.:

I, James J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of

the Eastern Judicial District of Missouri, Do Hereby Certify the above and foregoing to be a full, true and complete transcript (except insofar as the same is restricted by the designation of the record on appeal heretofore set out) of the record and proceedings in Case No. 807, wherein United States of America, is plaintiff and Certain Land Situate in The County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al, are defendants; and in case No. 874, wherein United States of America, is plaintiff and Certain Land Situate In St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al, are defendants, as fully as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said court at office in the City of St. Louis, in said Division of said District this 9th day of March, in the year of our Lord, Nineteen Hundred and Forty-three.

Seal
U. S. Dist. Court
East. Div. of the
East. Judicial Dist.
of Missouri

JAMES J. O'CONNOR,
Clerk, U. S. District Court,
By John J. Jarvis,
Deputy Clerk.

Endorsed: Transcript of Record on Appeal filed in U. S. Circuit Court of Appeals March 10, 1943.

[fol. 971] (Order of United States Circuit Court of Appeals for Transmission of Original Exhibits from District Court and concerning printing thereof.)

United States Circuit Court of Appeals, Eighth Circuit

Appeal from the District Court of the United States for the Eastern District of Missouri.

United States of America, Appellant,
No. vs.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al.

Appeal from the District Court of the United States for the Eastern District of Missouri.

United States of America, Appellant,
No. vs.
Certain Land Situate in St. Charles County, State of Missouri, Known as Tract No. 19, and William M. Andrews, et al.

In these cases the appellant, United States of America, has filed a motion for an order of this Court directing the Clerk of the District Court of the United States for the Eastern District of Missouri to transmit all of the original exhibits to this Court, together with the transcript on appeal, stating that said exhibits are photographs, plats, aerial maps, and voluminous documents which would be inordinately expensive to reproduce. Attached to the motion is a stipulation of counsel for the respective parties consenting to such order and copies of orders of the District Court authorizing the transmittal of the original exhibits, such stipulation also providing that all exhibits may be filed in the office of the Clerk of this Court pursuant to the orders of the District Court and that such exhibits are to be considered before this Court as fully as if set out verbatim in the printed transcript of the record and may be used and referred to by either party. The motion is supplemented by letter of counsel for the Government to the Clerk of this Court under date of February 22, 1943.

Upon consideration Whereof, It is ordered by this Court:

[fol. 972] 1. That all of the original exhibits in these causes be by the Clerk of the District Court transmitted to this Court to be available for such purposes as this Court may permit or rule at the time of the hearing of the appeals;

2. That such portions or summaries of the exhibits as are deemed essential may and shall be printed or reproduced in and as a part of the printed transcript of the record for the hearing of the appeals, submission to and consideration thereof by this Court. The exhibits coming within this category are the following:

Exhibits G-11, GU-4, 15, 1023-2, 1001-1, Def. 1; In case 807, Exhibits D-3, AG-3, Def. C, 807-3; In case 874, Exhibits 1, 2, 5 and 7. These exhibits need not be printed in their entirety.

3. Exhibits which are deemed by counsel as being unnecessary and will only encumber the record are the following and they need not be printed or reproduced in the printed record, viz:

Exhibits WD-1, AG-1, Def. 5, Def. 7, 4, 4-A, 4-B, 4-C, 4-D, 4-E, 5, 5-A, 5-B, 6, 6-A, 7, 7-A, 8, 8-A, 8-C, 11, 3-C, A, 12, 2, 14, 3, Def. 8, and Def. 10.

4. The following exhibits may be used at the hearing of these appeals for illustrative purposes and need not be reproduced in the printed record, viz:

Exhibit 1, Aerial map of area, Exhibit 2, Survey map of area, Exhibit 3, Photograph of improvements on tract, Exhibit 4, Photograph of improvements on tract, Exhibit 6, Land map, showing the property, and Exhibit 12, Aerial map of area.

All exhibits herein referred to or listed are United States exhibits except where distinguished by having the word "Def." before the exhibit number.

If before or at the time of hearing of these appeals in this Court it becomes apparent to counsel that any further portions or summaries of exhibits are essential a further application may be made to this Court and the matter will be covered by appropriate order.

Disposition of the original exhibits sent up under the motion, stipulation and this order, in either of these causes after hearing and determination by this Court shall be subject to the further order of this Court.

March 2, 1943.

[fol. 973] (Order of United States Circuit Court of Appeals permitting Printing of Consolidated Record on Appeals.)

United States Circuit Court of Appeals, Eighth Circuit

March Term, 1943.

Friday, March 12, 1943.

United States of America, Appellant,
No. 12,561 vs.
Certain Land Situate in the County of St. Charles, State of Missouri, Known as Tract No. 24/233, and James Karl Muschany, et al., Appellees.

United States of America, Appellant,
No. 12,562 vs.
Certain Land Situate In St. Charles County, State of Missouri, known as Tract No. 19, and William M. Andrews, et al., Appellees.

Appeals from the District Court of the United States for the Eastern District of Missouri.

In these causes counsel for appellant has filed a motion for an order authorizing and permitting the appellant to print a consolidated record. Attached to said motion is a copy of stipulation entered into by and between counsel for the respective parties for the filing of a joint transcript of the record and for inclusion therein of certain testimony produced before the Judges of the District Court sitting in said causes.

In pursuance of said motion and the stipulation of counsel, it is Ordered by this Court that a consolidated transcript of the record may be prepared in the District Court for filing in this Court and thereafter printed for the hearing, submission and determination of these appeals in this Court. March 12, 1943.

[fol. 687] (Appearance of Mr. Harry C. Blanton, Mr. Norman Littell, Mr. Russell Vandivort and Mr. Drake Watson as Counsel for Appellant in Cause No. 12561.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, Appellant,
No. 12561. vs.
James Karl Muschany, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

HARRY C. BLANTON,
NORMAN LITTELL,
RUSSELL VANDIVORT,
DRAKE WATSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 5, 1943.

(Appearance of Mr. Norman MacDonald as Counsel for Appellant in Cause No. 12561.)

The Clerk will enter our appearances as Counsel for the Appellant.

NORMAN M. LITTELL,
Assistant Attorney General
Washington, D. C.

NORMAN MacDONALD,
Attorney, Department of Justice,
Washington, D. C.

[fol. 688] (Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 2, 1943.

(Appearance of Counsel for Appellees in Cause No. 12561.)

The Clerk will enter my appearance as Counsel for the Appellees.

WM. R. GENTRY.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 17, 1943.

(Appearance of Mr. Harry C. Blanton, Mr. Norman Littell, Mr. Russell Vandivort and Mr. Drake Watson as Counsel for Appellant in Cause No. 12562.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, Appellant,
No. 12562. vs.
William M. Andrews, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

HARRY C. BLANTON,
NORMAN LITTELL,
RUSSELL VANDIVORT,
DRAKE WATSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Apr. 5, 1943.

[fol. 689] (Appearance of Mr. Norman MacDonald as Counsel for Appellant in Cause No. 12562.)

The Clerk will enter our appearances as Counsel for the Appellant.

NORMAN M. LITTELL,
Assistant Attorney General,
Washington, D. C.

NORMAN MacDONALD,
Attorney, Department of Justice,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 2, 1943.

(Appearance of Counsel for Appellees in Cause No. 12562.)

The Clerk will enter my appearance as Counsel for the Appellees.

SAMUEL M. WATSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 19, 1943.

[fol. 690] (Order of Submission in Causes Nos. 12561 and 12562.)

United States Circuit Court of Appeals,
Eighth Circuit.

September Term, 1943.

Wednesday, September 15, 1943.

United States of America, Appellant,
No. 12561. vs.
James Karl Muschany, et al.

Appeal from the District Court of the United States for the Eastern District of Missouri.

and

United States of America, Appellant,
No. 12562. vs.
William M. Andrews, et al.

Appeal from the District Court of the United States for the Eastern District of Missouri.

These causes having been called for hearing in their regular order, argument was commenced by Mr. Harry C. Blanton, United States Attorney, and continued by Mr. Norman MacDonald, Attorney, Department of Justice, for appellant, continued by Mr. William R. Gentry for appellees James Karl Muschany, et al., and concluded by Mr. Samuel M. Watson for appellees William M. Andrews, et al.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 691] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 12,561.

United States of America,
Appellant,
vs.
James Karl Muschany and Vera Muschany,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

No. 12,562.

United States of America,
Appellant,
vs.
William M. Andrews and Bertha L. Andrews,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Missouri.

[December 22, 1943.]

Mr. Harry C. Blanton, United States Attorney, and Mr. Norman MacDonald, Attorney, Department of Justice (Mr. Norman M. Littell, Assistant Attorney General, Mr. Russell Vandivort and Mr. Drake Watson, Assistant United States Attorneys, with them on the brief) for Appellant.

Mr. William R. Gentry for Appellees James Karl Muschany and Vera Muschany.

Mr. Samuel M. Watson (Mr. Webster R. Karrenbrock and Mr. Redick O'Bryan with him on the brief) for Appellees William M. Andrews and Bertha L. Andrews.

Before WOODROUGH, THOMAS and JOHNSEN, Circuit Judges.

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

The critical question is whether the contracting system used by the War Department in purchasing land for a munitions-plant site at Weldon Springs, St. Charles County, Missouri, which allowed the landowners to fix their selling price and to add five per cent thereto as compensation to the Government's optioning agent, was a "cost-plus-a-percentage-of-cost system of contracting", within the prohibition of section 1 of the National Defense Act of July 2, 1940, 54 Stat. 712, 50 U.S.C.A. App. § 1171.[1]

The Secretary of War had directed the Quartermaster General to acquire the land necessary for the site, after the President had approved the Weldon Springs project. In an effort to get the job done speedily, the officer in the Quartermaster Corps to whom the task was assigned decided to avail himself of the proffered services of R. Newton McDowell, of Kansas City, Missouri, as optioning agent, for a commission of five per cent on the landowner's price, to be added into the gross figure of the submitted option. The record is conclusive that, while McDowell's

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[1]Section 1 of the Act provides in part that "the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction * * * of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the * * * manufacture * * * of * * * munitions * * *; and (3) to enter into such contracts * * * as he may deem necessary to carry out the purposes specified in this section: * * *Provided further, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War"

written proposal, which the Quartermaster Department purported to approve and accept, recited that his compensation should consist of a five-per cent commission "to be paid by the vendor", and while the purchase-option form, which the Department required McDowell to use, similarly provided that the landowner would "pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction", the actual agreement between McDowell and the Quartermaster Department was that McDowell should obtain a price from the landowner which he would be willing to recommend to the Department for approval;[2] that the landowner should then be allowed to add an additional five per cent as compensation for McDowell; and that the total should be inserted in the option as the gross sale-price figure.[3]

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[2]Some of the transactions shown in the record (a number of which will be referred to in the opinion later) suggest that McDowell was a somewhat willing "recommender". Thus, in one case (not involving any of the appellees here), he first submitted an option, executed by an attorney in fact, for $4500, with a letter recommending "its acceptance as a fair value to the United States Government." Later, when the landowner repudiated the authority of the attorney in fact, McDowell took an option from the owner for $10,000 and submitted it with a letter stating, "I recommend this as a fair value to the United States Government and trust you will approve same." Still later, when these discrepant recommendations had apparently created a stir in the Department, McDowell wrote another letter declaring, "In lieu of the fact that the Government will have to obtain this land through condemnation, it is our opinion that $75 per acre [a total of approximately $4,900] is a fair appraisal for this land."

[3]The Quartermaster Department apparently also had agreed that McDowell should allow the landowner to include in the option figure an additional 1½% of his net-wanted price, as a fee for the Kansas City Title Insurance Company in preparing deed, handling closing details, and issuing title certificate, and further to include the amount of the necessary revenue stamps and cost of recording the deed. McDowell's written proposal, which, as heretofore indicated, the Department had purported to approve and accept, contained a provision that McDowell would "at his [own] expense procure the services of the Kansas City Title and Insurance Company * * * to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination." The options all contained a provision that the landowner should execute and

McDowell procured and submitted 270 options, which the Quartermaster Department approved on his recommendation,[4] without any supporting appraisal data.[5] After 129 of these transactions had been closed and conveyances of title completed—approximately $1,000,000 having been paid out in public funds—the situation appears to have been made the subject of investigation by the Department

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deliver a general warranty deed, "including stamps", and should "furnish, without cost to the Government, a certificate of title of the Kansas City Title Insurance Company to the said land satisfactory to the Attorney General of the United States." These inconsistencies and disguisings can hardly be commended as desirable methods of handling expenditures of public funds. The excuse made by the Quartermaster Department on the trial was its desire to get the job done as speedily as possible and "because in one single voucher we could provide for the payment of a number of different services." The result reached in the opinion requires no further pursuit here of these particular matters.

One other aspect of the general situation also perhaps bears passing mention, although it too will not be dwelt upon, since it is not controlling of the result reached. In the cases where the transaction was completed and the money paid by the Government, McDowell and the Title Insurance Company had the landowner indorse the Government's check and then deducted 5% and 1½% respectively of the total option price, and not of the landowner's original wanted-price, as was the Quartermaster Department's intention. They appear to have taken the position with the landowners that this was "the letter of the bond", under the language used in the option contract. McDowell accordingly collected commissions upon his own commissions, commissions upon the Title Insurance Company's commissions, and even commissions upon the revenue stamps and recording fees. The Title Insurance Company did likewise. In many instances these compounded differences were substantial, one case, for example, being shown in the record where the extra deductions resulted in the landowner receiving $171.30 less than the figure which McDowell had accepted as the net-wanted price in the preparation of the option. The protests of the landowners seem to have been unavailing, except that the record indicates one or two instances in which McDowell yielded to the indomitable will (and perhaps the stentorian tone) of the landowner.

[4]According to the record, McDowell previously had been engaged in the contracting business. He was a resident of Kansas City, Missouri; the Weldon Springs project was located near St. Louis. Employees of his contracting organization were used to assist in soliciting the options from the landowners.

[5]The record and the findings of the trial court leave no question here as to the actual good faith of the Quartermaster Department in the matter, so that we have no judicial right to condemn the methods which the Department saw fit to employ, unless they are illegal, as a matter of specific legislative prohibition, or—of general want of statutory authority, or of inherent and necessary public policy. Cf. *United States* v. *1997.66 Acres of Land in Polk County, Iowa*, 8 Cir., 137 F.2d 8, 14.

of Justice.[6] The remaining 149 contracts were thereafter repudiated by the Government, and condemnation proceedings were instituted against the landowners, declarations of taking were filed, deposits of estimated just-compensation were made, and the appointment of commissioners was requested. These estimates were materially less than the theretofore-approved contract prices, and the landowners accordingly set up the contracts as legally having fixed the measure of their compensation rights, and prayed that awards be entered for the contract amounts, without the appointment of commissioners. The Government in reply alleged that the purchase-contracts were invalid and renewed its demand for the appointment of commissioners to appraise the value of the property.

Because individual condemnation proceedings were instituted against the properties involved, resulting cases fell upon the dockets of all of the then-three judges for the district. One case from each judge's docket was taken as a test case, and the three judges sat together to hear the evidence and the argument as to the general invalidity of the contracts. Each judge, however, made disposition of his own case. One judge held that the purchase contract was within the congressional prohibition against any use of "the cost-plus-a-percentage-of-cost system of contracting", and hence was invalid.[7] That case is not involved in this appeal. In the other cases, each of the two judges held that the contract was not violative of the congressional prohibition, nor was it otherwise invalid, and that the landowner was accordingly entitled to have an

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[6]The record does not show that the Quartermaster Department ever had sought or obtained the approval of the Attorney General to the system and methods used. The Attorney General's office apparently only was requested to pass upon the sufficiency of each submitted title before the money was paid out. The officer of the Quartermaster Department, who had charge of the matter, testified, however, that he had consulted legal advice (presumably within the War Department) and that he came to the conclusion that the prohibition against "the cost-plus-a-percentage-of-cost system of contracting" did not apply to real estate transactions.

[7]*United States* v. *94.68 Acres of Land in St. Charles County, Missouri*, D.C.E.D. Mo., 45 F.Supp. 1016.

award entered for the contract amount, without the appointment of commissioners.[8] It is these two cases which are now before us, on the Government's appeal.

That purchases of real estate, which allow the landowner to fix his wanted-price and then add a certain percentage of this amount for some special purpose, all to be paid to him solely as consideration for the conveyance, literally may be regarded as constituting cost-plus-a-percentage-of-cost transactions, there can be no doubt. That Congress has the right to prohibit the use of any or all cost-plus-a-percentage-of-cost forms or methods of public contracting, there can equally be no question. The argument made here, however, is that the prohibition in section 1 of the National Defense Act of July 2, 1940, should be construed as being intended to apply only to construction contracts, and not to contracts for the purchase of real estate. This was the view of the trial court.

It may be conceded that cost-plus-a-percentage-of-cost contracts are most commonly used in and associated with the construction and production fields. But it is clear from the record, as heretofore indicated, that what literally constitutes a cost-plus-a-percentage-of-cost method of contracting is also capable of being used in the real estate field, and that it has been so used, not only in this but on other governmental projects.[9] In this connection, it is to be noted that the construction of munition plants and the acquisition of real estate necessary therefor are co-ordinate authorizations under section 1 of the Act, and that the language of the prohibiting proviso is unqualified and commands gen-

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[8]The opinion of the trial judge in Appeal No. 12,561 is reported in *United States* v. *Certain Land Situate in St. Charles County, Missouri*, 46 F.Supp. 921. The legal views there expressed were accepted and adopted by the trial judge in No. 12,562.

[9]The record shows that the Quartermaster Department had used the same contracting method as here, in acquiring the land for seven other projects. One of the contracts made on another project was involved in *United States* v. *Grace Evangelical Church of South Providence Ridge*, 7 Cir., 132 F.2d 460.

erally that "the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section". The record demonstrates further, not only as an apparent possibility but as a reasonable probability, that the use of such a contracting method in acquiring real estate is productive of some of the very evils which Congress manifestly was attempting to prevent, in any expenditure of public funds under section 1 of the Act. In view of all of the foregoing, we do not feel that there is any sound reason or judicial right to impose such a limitative construction upon the general language of the prohibition, as appellees would have us do with respect to real estate transactions.

One of the evils aimed at by Congress undoubtedly was the tendency of any cost-plus-a-percentage-of-cost system to increase prices to the Government. The probability of that general result in the Weldon Springs transactions is, as we have indicated, quite cogently suggested (and indeed demonstrated) by the record. We do not mean to imply that the record establishes that McDowell's recommendations were altogether dominated by his plus-interest in the contracts, even though he knew that the Quartermaster Department was accepting and approving them without appraisal reports or data. In fairness, it must be recognized that McDowell was trying to do a speedy job, and that his instructions from the War Department were to preserve as much good will in the community as possible. It should perhaps also be stated that only a portion of the total 270 transactions involved are attempted to be detailed in the record. But the transactions shown, without any effort to explain or neutralize them (McDowell did not take the stand), necessarily tend to indicate the general course of dealing in the optioning transactions, and, at the least, they can hardly be said to warrant any inference of commission-obliviousness in the general situation.

We have made passing mention in a preceding footnote of McDowell's attempt, in making closing settlements with

the landowners, to collect, contrary to his agreement with the Quartermaster Department (but perhaps within the literal language of the option), commissions upon his own commissions, commissions upon the commissions of the Kansas City Title Insurance Company for closing the transactions, and commissions upon the amounts included in the contracts for revenue stamps and recording fees. We have similarly referred to the instance where McDowell first submitted and recommended approval of an option from an attorney in fact for $4,500; later took an option from the landowner personally for $10,000 and made the same recommendation; and finally wound up, after the Government decided to condemn, with the statement that a value of approximately $4,900 was "a fair appraisal for this land". There is another unexplained incident in the record where the landowner testified that, when he named his own price for the property, one of McDowell's men declared that "he would like to add fifty dollars an acre more for the land", but, as the landowner put it, "I said that was all I wanted". In the case that was tried by the third district judge, referred to above but not involved in this appeal, the opinion observes that "The price agreed on with Miss Callaway was probably not much more than double what a jury would have awarded her on the evidence presented."[10] In another transaction shown, where a store property belonging to a three-member partnership was being purchased, McDowell allowed $3,000 to be included in the price of the real estate, for loss on fixtures and merchandise, and the further sum of $3,000 to be added in, for "1 year's loss in salary of each partner". In still another case, involving the purchase of a garage and store property, the owners were allowed to fix a value of $3,500 upon the real estate and then to add into the price to be paid the sum of $6,500 for "loss of business". What particular elements McDowell had fused into the real estate values recom-

[10] 45 F.Supp. at page 1018.

mended by him in any specific transaction were apparently not known to the Quartermaster Department at the time the contracts were approved.

Without further discussing any of the other instances of questionable and inflative elements which the Government attempted to prove on the trial, in order to demonstrate what the general situation had been, we have said enough, we think, to indicate at least the probable tendency of the contracting system used to increase the prices to the Government—and that not merely on the part of McDowell but of the landowners as well.

But it is argued that the evidence does not specifically show that such a result had been produced in either of the two cases that are here involved, and that the findings of the trial court are to the contrary. In No. 12,561, the court made a finding that "The option price of $4,500 is not an unreasonably excessive valuation of the land in question." A similar finding was in effect made as to the option price of $12,000 in No. 12,562. The latter finding is perhaps a bit strained, since the substance of the evidence on behalf of the landowners was simply that the land had a farm value of only $50 an acre (a total of $4,725), but, as the landowners' only value-witness put it, "I think someone from St. Louis that wants a site would pay as high as $125 an acre [a total of $11,800] for that ground."

There is, however, no occasion for us here to review either the Government's or the landowners' evidence as to value in the two cases. If the value of the land were the issue to be determined, we might hesitate to reject the trial court's findings in either case, under Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following §723c. But the findings referred to are not determinative of the issue here being considered. We need only repeat, what we have previously attempted to make plain, that the various transactions which have been set out above are intended

merely to demonstrate the probable tendency of the contracting system used to produce inflative evils to the Government, and that, in such a general situation, and because the contracting methods employed can literally be said to be within the language of the congressional prohibition, there would seem to be no sound reason or judicial right to impose a restrictive interpretation upon the statute, which would limit its application to construction contracts only, and exclude real estate transactions from its operation. Quite clearly, it seems to us, if a contract is violative of the policy prohibition made by Congress in the field covered by section 1 of the Act, it is invalid per se, and the reasonableness or excessiveness of the price to be paid by the Government thereunder is without legal significance.[11] The proviso of the statute can hardly be regarded as a mere directive to the War Department, but necessarily must be treated as a prohibition to all contracting parties in the field to which it applies.

It is argued, however, that the instant contracts ought not to be held to be within the congressional prohibition, because the trial court has found that "there is no evidence that the option price * * * included the amount the defendants asked for the land plus McDowell's fee of 5% of sale price." But this finding is in our opinion clearly erroneous. It is true, of course, that there was no express testimony that McDowell's commission had been included as a plus-item in the particular contracts. The landowners naturally refrained from going into that point in their testimony, either to affirm or deny. McDowell did not take the stand. The Government, however, conclusively proved that this was the system which the Quartermaster Department had authorized McDowell to use; that it was the plan which McDowell did follow in numerous other transactions

[11] The language in the opinion in *Weil v. Neary*, 278 U.S. 160, 173, 49 S.Ct. 141, 73 L.Ed. 243, is appropriate here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases. Even if the ultimate results * * * were good, that could be no excuse for a contract plainly illegal * * *."

detailed in the record; that it was the method which he had explained, to a general meeting of the landowners and their legal representatives, would be employed—and both of the husband-appellees were admittedly present at this meeting; that the use of the system was the subject of heated discussion at the meeting, because some of the attorneys present denounced it as illegal and warned McDowell against the possible consequences; that a general committee of landowners also had been formed and other publicity steps taken, to the end, among others, that the landowners would be fully informed of what was to be done and how it was to be accomplished; and that one of the matters on which the landowners appeared particularly to want assurance was that they were not going to have to pay McDowell a commission out of their wanted-price, but that he was only to have a plus-interest in the contract. To say in this situation that the evidence does not satisfy that McDowell's five per cent was added into the option price in these two cases, pursuant to the undisputed general plan, and to assume, without any such testimony on their part, that these landowners, in disregard of the known general scheme, had philanthropically agreed to pay McDowell a commission out of their own wanted-price, is simply to tax judicial credulity, ignore plain reality, and override inescapable conviction.

It is also argued that, since the plus-interest was to go to McDowell and not to the landowner, the congressional prohibition should be held to have no application. But this again is simply an attempt to invite a judicial paring of the statute. Whether the percentage-of-cost interest in a cost-plus contract is made to go to one person or another would hardly insure elimination of the general evil, of which Congress manifestly believed the prohibited system was productive in the field to which the statute was made applicable. Thus, in a construction contract, provision might be made for assignment and payment of the plus-percentage to some creditor, but such a distribution of the fruits

from the contract would certainly not give legality to the use of the prohibited system.

It is further argued that, upon approval of the option by the Quartermaster Department, McDowell's interest actually had become fixed and certain in amount, and that the contract therefore should be regarded as a cost-plus-a-fixed-fee form of contract and hence not subject to the prohibition. This contention is not without merit and force. The prohibition against the use of "the cost-plus-a-percentage-of-cost system of contracting" in section 1 of the Act is followed with the clause, "but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." We do not believe, however, that it was the intention of Congress—as is the effect of appellees' argument here—that the prohibited system of contracting could become clothed with legality by a mere decoration in form. To so hold is to say that it was merely the cost-plus-a-percentage-of-cost "form" of contract which Congress intended to prohibit, and not the "system of contracting". We think that, in forbidding the use of such a "system of contracting", Congress was intending to reach not simply the form but fully as much the method of dealing and contracting, in the covered field. Certainly, there can be no escape from the fact that it is the method which constitutes the real root of the evil, and that the evil cannot be eliminated by a mere disguising of form. Where, therefore, as here, it is clear, without violation of any rule of evidence or other substantive principle, that the contract dealings between the parties actually represent a use of the cost-plus-a-percentage-of-cost system of contracting, the congressional policy sought to be effected in the covered field, by the prohibition in section 1 of the Act of July 2, 1940, should in our opinion be given full effect.[12]

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[12]Our attention is called in the briefs to a provision in the Navy Regulations, 34 Code of Fed. Reg. §8.2400(b), relating to general cost-plus contracts and reading in part as follows: "It is * * * preferable that a fixed profit of a definite sum of money per article be agreed upon instead of a percentage of cost. Such fixed profit can be arrived at by taking a percentage, say, 10 percent, of the estimated cost of each article or the en-

The point is suggested, though not labored, that the contracts should be considered and construed in the light of the Secretary of War's general powers under the Act of July 2, 1917, 40 Stat. 241, 50 U.S.C.A. § 171.[13] But any contracts made by the Secretary of War, for the construction of munition plants or the acquisition of land for plant sites, involving the use of appropriations made for the period that the Act of July 2, 1940, should remain in effect,[14] would necessarily be subject to the prohibition of that Act, regardless of any powers which the Secretary might otherwise have under the Act of July 2, 1917.

Finally, the ad hominem argument is made that the Government should scrupulously be required to live up to its contracts, and *United States* v. *Bethlehem Steel Corporation*, 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855, and other cases are cited as supportive authorities. With the general principle argued there can be no judicial disagreement. It should be noted, however, that in the Bethlehem Steel case the contracts involved had been made "pursuant to a congressionally selected policy", as the opinion emphasizes, while here they fly in the face of an express congressional prohibition. It is quite a different thing, from what was held in the Bethlehem Steel case and the other cases cited, to say that public contracts, made by a method or system

tire job * * * The fixed profit agreed on should be subject to adjustment, so that the contractor may share in the saving of or be charged with part of the excess of actual cost over estimated cost." This Regulation, however, antedates the Act of July 2, 1940, and manifestly does not purport to have been drawn in any attempted correlation to that Act. Furthermore the Act of July 2, 1940, by its terms, appears to have application to the War Department only. There is no occasion therefore for us to consider or discuss this Regulation here. The congressional policy of the Act of July 2, 1940, necessarily applies only to the field which it was made to cover.

[13]This Act provides in part that "when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay * * *."

[14]By 56 Stat. 317, 50 U.S.C.A. App. §§ 773 and 776, the prohibition of section 1 of the Act of July 2, 1940, was continued in force "during the continuance of the present war and for six months after the termination of the war, or until such earlier time as the Congress by concurrent resolution or the President by proclamation may designate" and was "made applicable to moneys appropriated for the War Department for national defense purposes during the period prescribed".

which Congress has prohibited, should be enforced against the Government simply because a public officer has presumed to enter into them.

One may sympathize, of course, with the ruffled feelings of the landowners whose contracts have now been challenged, after a large number of similar transactions have previously been closed. But that cannot be permitted to obfuscate a plain legal duty. The landowners were, in law, as much charged with knowledge of the congressional prohibition, and of their lack of right to become a party to the use of such a contracting method, as was the Quartermaster Department—albeit they had assumed that they could rely upon the combined wisdom of McDowell and the Department. Despite the momentary hardships and inconveniences which doubtless have been occasioned, no legal injustice will have been done the landowners, for the way is open to them to receive the actual value of their property in the condemnation proceedings, and that is all, in view of the invalidity of their contracts, that they legally, equitably or morally have any right to demand.

The views here taken make unnecessary a discussion of any of the other contentions of the parties.

The judgment in each of the two cases is reversed, and the causes are remanded with directions to declare the purchase-contracts invalid, and to appoint commissioners to determine the value of the properties.[15]

[fol. 707] (Judgment in Cause No. 12561.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1943.

Wednesday, December 22, 1943.

United States of America, Appellant,
No. 12561. vs.
James Karl Muschany and Vera Muschany.

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[15] In *United States* v. *Grace Evangelical Church of South Providence Ridge*, 7 Cir., 132 F.2d 460, reversing a judgment of the district court, a contract arising out of a similar contracting method on another project was held valid. The cost-plus question is specifically discussed in the minority opinion, at page 463, but is only implicationally involved in the decision of the majority.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to declare the purchase-contract invalid, and to appoint commissioners to determine the value of the properties involved.

December 22, 1943.

[fol. 708] (Judgment in Cause No. 12562.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1943.

Wednesday, December 22, 1943.

United States of America, Appellant,
No. 12562. vs.
William M. Andrews and Bertha L. Andrews.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to declare the purchase-contract invalid, and to appoint commissioners to determine the value of the properties involved.

December 22, 1943.

In The United States Circuit Court of Appeals

FOR THE EIGHTH CIRCUIT.

Nos. 12,561, 12,562.
Civil.

UNITED STATES OF AMERICA,
Appellant,

v.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS,
Appellees.

Appeals from the District Court of the United States for the Eastern District of Missouri.

PETITION OF APPELEES, JAMES KARL MUSCHANY AND VERA MUSCHANY FOR A REHEARING

Come now the appellants, James Karl Muschany and Vera Muschany, within fifteen days after the filing of the opinion and decision of the Court in this cause, and respectfully move and petition the Court to grant them a rehearing of said cause for the reasons following, to wit:

I.

The Court, in holding that the contract was rendered void because in violation of Public Act No. 703, prohibiting the making of contracts on the basis of cost-plus-a-percentage-of-the-cost, overlooked much of the argument made by these appellants in their brief under point III on pages 24 to 32, inclusive, of their argument, by which it was demonstrated that the contract involved herein was of a wholly different character from contracts covered and prohibited by said Public Act No. 703, and its provisions were such that it does not fall within the condemnation of said act.

The evil consequences likely to result from the making of a cost-plus-a-percentage-of-the-cost type of contract are due to the fact that in making such a contract the Government is left entirely in doubt and uninformed as to what the cost eventually will be, while the door is thrown wide open to contractors, by their extravagance or crookedness, to increase the cost to the Government enormously and thereby to increase their compensation. In making such a contract nobody could tell at the time of the signing thereof what the cost would be. Contractors could allow material men and subcontractors and workmen to charge all kinds of fancy prices (perhaps secretly dividing with the contractors), and thus and thereby the cost of an article or the cost of construction could be greatly increased beyond what was calculated in advance and what would seem in advance to be the reasonable cost. What the contractor was to receive as his compensation in such a contract was equally unknown when the contract was signed, because the amount on which his percentage was to be figured was then unknown.

Great frauds resulted from the making of such contracts, and to avoid just exactly that thing was what Congress sought to do when it put in the provision respecting such contracts when it passed Public Act No. 703.

The Court also overlooked certain facts brought out in the evidence as well as the contentions as to the law made by the appellants herein on that subject.

When Col. Valliant was on the stand the Government's attorney endeavored to show by him that the whole question of the prices to be paid was left entirely to McDowell. In this the Government failed, as appears from the testimony of Col. Valliant in the printed record herein, beginning on page 276 and running through page 308.

We call the Court's attention particularly to the following excerpts from the testimony of Col. Valliant:

1. Page 278:

> "Q. What procedure was followed by your Department when one of these options would be received in the Department? A. We had under way, in connection with the expediting of the National defense, about 108 separate projects totalling about fifty million dollars worth of property to be acquired. I had at my disposal three commissioned officers and about forty-one civilian employees, and the work was apportioned among certain ones of these empolyees. In the Acquisition Section there were seven men who were experts in their line of work, and to one of these the particular option would be assigned, depending on whether that was his case or not. His instructions were to examine it, to examine the papers that accompanied it, and if it appeared to him to be in accordance with the project and with the amounts that we expected we would have to pay for it in that region, to approve it and send it to me for signature."

2. On page 279:

> "Q. Did you have any independent knowledge of your own, other than what had been recommended to you, by Mr. McDowell, at the time these options were signed on these individual parcels, as to the value of this property? A. We were relying largely, but not

entirely, upon the recommendations of Mr. McDowell in each particular case; but we had under way projects numbering about 2,000 individual parcels in this particular section of the country, and we were able to compare the price of one with the price of another."

3. On page 282:

"Q. Now, Colonel, when you approved these various options, which I believe you stated occurred in every instance except one, according to your recollection, did you approve them on the theory the amount named in the options was the reasonable value of the property?

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A. I did, or else I would not have approved them.

Q. That was the theory on which you approved them, was it not? A. It was."

4. On page 283:

"Q. And by that approval you relied upon the recommendation of McDowell, as stated in those letters, plus whatever general information you may have had from your survey of all the projects in this Central Area? A. That plus whatever recommendations were made to me by my office associates, particularly the ones who were directly charged with handling each project.

Q. Were there anywhere in your Department appraisals on any of this Weldon Spring property at the time and prior to the time you approved these options?

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A. Assuming that the definition of appraisal is that of one by a licensee or qualified appraisers, there were not."

5. On page beginning near bottom page 285 and continuing to middle of page 286:

"The Witness: I did not understand the question.

Q. Well, you stated in reply to some of my questions a while ago that you approved these contracts because McDowell recommended them and because of your general knowledge about the Central Area conditions and the values of the Central Area, including lands from Ohio on the east. Now, if I understand you correctly, you stated that you told Mr. Mehaffy that if McDowell and Mehaffy's lawyer would agree on a valuation you would approve it? A. No, sir.

Q. What did you say?

• • • • • • •

A. No. That if his attorney could satisfy my agent as to the price that should be paid for that 'I am sure that there will be no dispute regarding it.'

Q. Well, do I gather from that, that if your agent, McDowell, approved the option that your approval automatically followed? A. No, sir.

Q. It did, however, did it not, Colonel?

• • • • • • •

A. I do not remember the details of any of the particular options that I signed. I must have signed some on the Mehaffy tract among the two hundred-odd that I signed."

It seems to us elementary that the landowners making contracts with Col. Valliant would have a right to assume that he would do his duty, and when he had acted, to assume that he had done his duty. The above excerpts from Col. Valliant's testimony indicate clearly that he did his duty. No law required him to have a written appraisal as to the value of every residence, farm house, barn, outbuilding, fence, etc. Col. Valliant was a man of vast experience in such matters as those here involved. He was handling 108 projects for the Government, scattered over many parts of the country, and he had a staff of helpers, some of them army officers, others civilians, some of whom were experts in such matters, and it is very evident that he was in a position to form a good opinion as to the reasonable value

of parcels of land in view of the conditions then existing and in view of his duties and privileges under the law authorizing the Secretary of War to acquire such properties by purchase rather then by condemnation, if he saw fit to do so.

All of the courts having anything to do with this matter have expressly exonerated Col. Valliant from any wrongdoing whatever in any of these transactions. When a proposition in writing was brought to Col. Valliant with the signature of a landowner attached, it had first passed the scrutiny of the Government's agent, McDowell, and came with his recommendation that the contract should be signed by Col. Valliant. In addition to that the proposed contract, after leaving McDowell's hands, had passed through the hands of one or more experts in such transactions and met with his approval before it was brought to Col. Valliant. Col. Valliant had been in the territory in which the 17,000-acre project was located and had been driven around over it so that he got a very good general idea of the property. With his vast experience in such matters and with the aid given him by the recommendation of McDowell and one or more experts in the War Department under Col. Valliant, he applied his own judgment. It is very apparent from his own testimony that he did not automatically approve everything that McDowell sent in, but that he took the precautions above outlined in every case.

The Court erred in holding that the Act of July 2, 1940, partially repealed section 171. It will be observed that the prohibition against cost-plus contracts in the Act of July 2, 1940, is limited to proceedings "under this Section." A similar situation was considered in In Re Military Training Camp in Prince George County, Virginia, 260 Fed. 986.

The Act of July 2, 1940 (50 U. S. C. A. App. 1171), provides:

"that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this Section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when the use is deemed necessary by the Secretary of War."

Congress did not define "cost-plus-a-percentage-of-cost," under the statute and it may be assumed that the term was used in its generally accepted meaning at the time. Cost-plus-a-percentage-of-cost contracts invariably exhibit three characteristics:

1. At the time the buyer becomes bound the cost is not known and cannot be ascertained.

2. At the time the buyer becomes bound the buyer, for all practical purposes, loses control over the cost.

3. At the time the buyer becomes bound the contractor acquires almost complete control over the cost. The contractor disburses his money and the buyer must then reimburse the contractor and in addition pay him the agreed percentage of the cost.

These are the distinguishing characteristics of a cost-plus-a-percentage-of-cost contract. If a given contract does not exhibit these characteristics then, whatever else it may be, it is not a cost-plus-percentage-of-cost contract.

In the cases at bar the procedure was as follows:

1. The landowner submitted an offer whereby he agreed to accept a certain lump sum for his land and agreed to pay a fixed percentage to McDowell and a fixed percentage to the title company. The lump sum stated in the contract was the total to be paid by the Government. The landowner was bound for the commission and title expenses as well as any expenses necessary in perfecting the title. In no event could the Government be forced to pay more than the lump sum named in the offer. The landowner

gave his offer to McDowell. At that time no one was bound. The Government had not accepted it and, since the landowner had received no consideration, he could cancel the offer at any time before acceptance.

2. McDowell submitted the offer to the Secretary of War, or his duly designated army officer, together with McDowell's recommendation. At this time no one was bound. The statute under which the Secretary was proceeding (50 U. S. C. A. 171) provides:

> "that when the owner of such land * * * shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay."

3. In the absence of proof to the contrary it must be assumed that the Secretary of War performed his full statutory duty, that he did not accept the offer unless he found that the price in his opinion was reasonable. Having found the price reasonable, he accepted the offer and by his signature bound the Government to pay the contract price.

It will at once be observed that when the Government became bound the cost was not unknown, but was fully known to the Secretary of War, because it appeared in the contract in a fixed lump sum. When the Government became bound it did not relinquish control over the cost, because the cost was fixed by the contract and could not be increased by any act of McDowell or the landowner or anyone else. When the Government became bound neither McDowell nor the landowner acquired control over the cost, since the cost was fixed by the contract, and no part of the cost was left dependent upon future action or future determination. Even though McDowell's cost of obtaining and submitting the offer had exceeded 5 per cent, his fee was fixed, in dollars and cents, by the contract and he

could charge no more. The entire cost was known and fixed at the time the Government signed. Obviously this contract was not a cost-plus-a-percentage-of-cost contract.

The opinion of the Court indicates that it found the contract to be a cost-plus-a-percentage-of-cost contract on one or both of two theories. Namely, **one** that the "system" or "method of operation" followed by the Secretary of War was badly designed and produced results similar to those sometimes produced by a cost-plus-a-percentage-of-cost contract; in other words, that any system of operation exhibiting evils similar to those found in cost-plus-a-percentage-of-cost contracts is prohibited by the statute whether prohibited therein or not. Now it may be that the Secretary of War adopted a system of contracting of which this Court does not approve, but the fact remains that the only prohibition in the statute refers to cost-plus contracts and not to unwise methods of procedure. We venture to suggest that the Court should not undertake to amend the statute at this time.

Two, the opinion also indicates that the Court felt that the Secretary of War blindly accepted every offer recommended by McDowell, without performing his statutory duty of determining whether the offer was reasonable. Of course, there is no such proof in the record; Colonel Valliant's testimony, above quoted, shows in detail the procedure followed in the consideration and acceptance of the offers. But even if the record were silent and there were no proof one way or the other, the Court is under the obligation to assume that the Secretary of War performed his duty and found the offers reasonable before accepting them.

The Court has attempted the impossible in this connection. It has undertaken to absolve the military authorities from any default in their duty, and at the same time has proceeded upon the assumption (contrary to the evidence)

that the Secretary of War failed to perform his duty of finding the offers reasonable before accepting them.

The fact is that the Secretary of War, through his duly designated agents, found the prices reasonable before accepting them and that the decision of the Secretary of War that the prices were reasonable is not subject to judicial review.

In ruling that the contracts in question fell within the inhibition of said Public Act the Court has overlooked the argument made in our brief and repeated here.

We respectfully submit that the Court has substituted its conclusion in place of the evidence on the subject of the supposed embodying of the percentage to be paid McDowell and that to be paid to the title company in the contracts in these cases.

The law entitles these property owners to the presumption that they did right, in the absence of evidence to the contrary, and does not entitle the Government or the Court to indulge the presumption, in the absence of evidence, that the property owners did wrong. The presumption of rightdoing rather than wrongdoing is one to which every citizen in the nation is entitled, in both civil and criminal cases, until evidence appears to destroy that presumption. In this case there is no such evidence. McDowell was the Government's agent, but it did not call him. Defendants were under no duty to call him.

Abundant evidence offered by these appellees showed that the land which they sold to the Government, without any improvements of any kind, and without the consideration of any elements other than the actual value of the land itself, had a fair, reasonable market value of at least $4,500.00. There is no evidence whatever tending to show that a lower price was fixed by agreement and that then 5 per cent thereof was added to pay McDowell's commission and 1½ per cent thereof added to pay the title company. Indeed, it would be most difficult to figure out any sum

as the reasonable value of the land and add the 5 per cent and the 1½ per cent thereto and arrive at an even figure, such as $4,500.00.

We respectfully submit, therefore, that the assumption by the Court that the plan followed in some other instances was adopted in this case is not only without evidence to support it, but is exactly contrary to the undisputed evidence.

II.

The Court in its opinion overlooked the authorities cited by these appellants in their brief under point V under its "Points and Authorities" on page 6 and under its "Argument" on pages 46 to 54, inclusive, by which it is established that the act of entering into the contract by the Government with these appellees was done in the proprietary capacity of the Government and that, therefore, the same rules applicable to the enforcement of contracts claimed to have been brought about by fraud will be applied against the Government as would be applied against a private individual, including the doctrine of estoppel.

Although the cases cited under said point, as shown by the quotations therefrom, demonstrate clearly that the rule of estoppel is applicable as against the Government, and the facts shown in the record bring this case within the doctrine established by the authorities therein cited, not a word is to be found anywhere in the Court's opinion on that subject, and, although, as these appellants verily believe, that said doctrine of estoppel is applicable and should preclude the Government from disowning said contract or refusing to carry the same out, no reference is made to that important subject in the Court's opinion herein.

III.

In its opinion this Court has overlooked the contention of these appellees, set forth under its "Points and Authorities" under point VII on page 7 thereof and under its "Argument" on pages 58 to 61, inclusive, and the authorities cited under said point, which, in conjunction with the facts shown in this case in the lower court, clearly establish ratification of the contract by the Government by its acts after being fully apprised of all the facts pertaining to the negotiation and execution of said contract; and, therefore, the Government ought not to be allowed to avoid said contract.

IV.

The Court, in its opinion, has overlooked the contention made by these appellees in their brief under point VIII on page 8 under its "Points and Authorities" and under its "Argument" on pages 61 to 62, inclusive, together with the cases cited under said point by which it was established that, under the facts shown in the evidence, even if misrepresentations were made by McDowell to Valliant as to the value of the land and relied upon by Valliant, such misrepresentations did not constitute ground for the rescission of the contracts of purchase made with innocent third persons.

V.

The Court, by implication at least, holds that fraud, as claimed by the Government, was shown as to transactions culminating in contracts relating to pieces of land belonging to persons other than these appellees, such transactions may be considered by the courts, although there is a total absence of any showing of a conspiracy between these appellees and such landowners or anybody else.

Such holding by the Court, if that is what it intends to hold, is wholly contrary to the law relating to conspiracies,

for, before one person can be held liable for the act of another person alleged to be fraudulent, there must be a showing of agreement or participation by the first-mentioned person in a conspiracy to perpetrate such a fraud. In so overlooking such rule, the Court does a great injustice to these appellees, which should be corrected by the granting of a rehearing, for there is not a single syllable in the evidence tending to show that either of these appellees by word or act ever entered into or participated in any sort of conspiracy with anybody, and therefore, even if certain persons defrauded the Government, acts on their part should not be considered in the case of these appellees, who objected to all evidence offered at the trial of the first case tried and stipulated into the record, for the very reasons set forth under this point in this petition.

VI.

In its opinion the Court has entirely overlooked the contention made by these appellees and supported by the citations in their brief under point IV thereof, both in the "Points and Authorities" at page 5 of said brief and in the "Argument" on pages 33 to 45 thereof, inclusive, to the effect that the act of purchasing defendants' land by the Secretary of War, through his duly appointed agent, being a discretionary act performed by an executive or administrative officer, such act is not subject to review by the courts, unless the officer abused his discretion or was guilty of fraud, neither of which exceptions was shown in this case. The attention of the Court is respectfully called again to all of the cases set forth in the brief of these appellants on the pages above mentioned, which cases fully support the contention of the appellants on this subject, but all of which were overlooked by the Court, as above stated.

VII.

In the closing part of the opinion the Court refers very lightly to the "ruffled feelings" of the land owners situated as these appellees are. It charges them with the duty to know about an Act of Congress which they had never seen or heard of, and with which nine out of ten lawyers throughout the union had no familiarity and convicts them of making contracts which the Court holds invalid because of that act, although those contracts were on forms furnished by the Government of the United States through its law department, which forms had been prepared in the War Department in enormous numbers by a lawyer or lawyers of such high attainments that the War Department employed them and relied upon their superior knowledge. The somewhat sarcastic reference in the last few paragraphs of the Court's opinion to the land owners and to their duty, and the reference to the combined wisdom of McDowell and the War Department, seem to us pretty hard upon the land owners in view of the way they have been treated by the Government in these cases. Anybody that knows how the Government deals with a private individual knows full well that when a representative of the Government prepares a form of contract and says it must be used, the private citizen dealing with him has no option whatever to change the slightest one of the terms of said contract. He signs it or there is no sale and his property in such a case as this is taken from him by condemnation.

The appellees most earnestly implore the Court to review the portion of its decision discussed under this heading, together with the original brief of their counsel filed in their behalf and these remarks in this petition for review, and they trust that upon a careful reconsideration of the matter the Court will arrive at a different conclusion from that announced in its opinion herein.

VIII.

On the last page of its opinion the Court says, "Despite the momentary hardships and inconveniences which doubtless have been occasioned, no legal injustice will have been done the land owners, for the way is open to them to receive the actual value of their property in the condemnation proceedings, and that is all, in view of the invalidity of their contracts, that they legally, equitably or morally have any right to demand." The Court's reference to the hardships suffered by property owners in the TNT plant area as "**momentary**" treats very lightly the hardships to which many of those property owners have been exposed, and we respectfully submit that the Court is in error in declaring that the way is open to them to receive the actual value of their property in the condemnation proceedings.

Let us take the case of a farmer who gave up his farm to the Government pursuant to his contract with the Government late in 1940. This farmer must find another home. As most farm leases run from March to March the difficulty of his finding a place into which he could move is obvious. As there were many others in similar position the demand for farms in the neighborhood was greatly increased. The influx, first, of construction workers, and then of operation workers at the TNT plant resulted in a shortage of housing and desirable farm land. The result was that many farmers had to move to distant counties.

If, relying on the Government's contract, a land owner bought a farm, expecting to pay for it when the Government paid him, he has either lost it, or strained his credit to the limit in the three years that have elapsed. Is he now financially able to employ counsel, obtain witnesses as to value and assemble the evidence necessary to meet the Government in the condemnation proceedings?

Even if he can find or borrow money to make a defense, how will he assemble evidence as to the value of his farm? In many cases the improvements have been destroyed, boundary lines have been obliterated and in fact access to his land may now be had only by grace of the Government, whose armed guards stand at entrances to the tract. They have pistols, but no grace.

Witnesses and neighbors who were familiar with his farm are scattered and moved away. Those who are still in the neighborhood are now, no doubt, employed by the TNT plant and will be reluctant to hazard their employment by testifying against the Government.

In the condemnation proceedings values will be established as of March, 1941. Assuming that the condemnation cases are tried in the spring of 1944, it will be summer, at least, before he gets his money. If the Government's tying up his capital for three years has prevented his buying a farm, he will have to buy one in 1944 when land prices are substantially higher than they were in March, 1941.

Finally, he must go to trial against the Government with the headlines screaming of the casualties suffered and those to come, and go before a jury, nearly every member of which will have a son or a brother or a nephew in the armed forces—an atmosphere as unfavorable for the trial of his case against the Government as could be imagined. To expect the farmer to regard this remedy as complete or adequate is indeed to impose a strain upon credulity. It will, in fact, be wholly inadequate.

The Court refers to the case of United States v. Grace Evangelical Church etc., 132 Federal (2d) 460. It is respectfully submitted that in that case a contract identical with the contracts in question except as to purchase price, description and names of owners, was held valid by a majority opinion of the Circuit Court of Appeals of the Seventh Circuit. The opinion in this case holds the

same kind of contract invalid. Such a conflict in opinion is most unfortunate in view of the fact that in various circuits many cases affecting such contracts will arise and confusion in the minds of trial judges and counsel for parties will inevitably result.

We respectfully submit that the correct view of the law was taken by the majority of the court in the Grace Church case and that it should be followed in this case, although, of course, we realize it is not in any sense binding upon this Court. It is, nevertheless, high authority and very persuasive.

It is respectfully and most strenuously urged that a rehearing of this cause be granted, and that upon such rehearing an affirmance of the judgment instead of a reversal thereof be ordered.

Respectfully submitted,

WM. R. GENTRY,
717 Louderman Building,
St. Louis, Missouri,
Attorney for Appellees James Karl Muschany and Vera Muschany.

Certificate of Counsel.

I, William R. Gentry, do hereby certify that I am attorney for the above-named appellees, and that the petition for a rehearing herewith filed is filed by me in good faith and is believed by me to be meritorious.

William R. Gentry.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 5, 1944.

FILE COPY

No. [redacted] 31

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit
and
BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now James Karl Muschany and Vera Muschany and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 22nd day of December, 1943, in the case lately pending in said Court of Appeals, entitled United States of America, Appellant, versus James Karl

Muschany and Vera Muschany, Appellees, bearing number 12,561, of causes on the docket of said Circuit Court of Appeals, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of these petitioners and against said respondent; which said judgment of the said Court of Appeals became final on the 14th day of January, 1944, by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of said Court of Appeals in the above-mentioned case which petitioners here seek to have reviewed has not yet been reported, but appears on pages 690 to 703 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The suit above referred to was instituted by the United States of America against these petitioners to condemn land to be used by the War Department for the erection of an ordnance plant to manufacture TNT for the use of the armed forces of the United States (R. 4-10).

A declaration of taking was filed on the 7th day of April, 1941 (R. 4-12). Judgment of condemnation on the declaration of taking was entered on April 9, 1941 (R. 13-16). The taking included tract No. 24-233, consisting of 33.33 acres of land owned by the petitioners herein.

On the 17th day of May, 1941, these petitioners filed an answer to the petition in condemnation in which they alleged that prior to the institution of said suit the United States Government, through its duly authorized agent, had entered into a contract with these petitioners to purchase said land at the price of $4,500. The terms of the

contract were set forth and the petitioners prayed the Court to dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price, pursuant to the terms of said contract (R. 18-20).

A reply to said answer was filed, followed by the filing of an amended reply and on April 3, 1942, by the filing of a second amended reply to the answer (R. 21-37), in which the Government alleged that the purchase contract was fraudulent because of certain alleged fraudulent representations; contrary to public policy and violative of a provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix, Sec. 1171, known as Public Act No. 703.

On account of the large number of cases wherein the validity of the contracts was involved, and the importance of said cases, the three District Judges sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet; and he made the rulings on the evidence offered and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 Acres of Land in St. Charles County, Mo., 45 Fed. Sup., p. 1016.) The other two Judges went to their respective court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases, and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of the statute of the United States known as the Act of July 2, 1940 (Public Act No. 703), above cited, prohibiting the making of contracts by the Government on the basis of cost-plus-a-percentage-of-cost.

Judge Davis, in the Muschany case, decided that the said statute did not apply as the contract in question was

not of the character prohibited by said statute and did not violate that statute; found that the contract was valid and binding and that there was no evidence tending to show that it was procured by fraud. Judge Davis filed a written opinion which is set forth in the record herein, pages 449-460. (For decree see R. 466-468.) See U. S. v. Certain Lands in St. Charles County, Mo., 46 Fed. Supp. 920.

Judge Moore held the contract in the Andrews case valid and adopted, as far as applicable, the opinion which had been rendered by Judge Davis in the Muschany case. Judge Moore's opinion is set forth in the record herein, pages 656-657. (For decree in that case, see R. 663-665.)

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land and that commissioners should be appointed to fix the value of the land in question in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein (petitioners herein) were entitled to have judgment entered on the contract for the sum fixed therein, to wit, $4,500, together with interest thereon, less amount deposited in court by the Government as the estimated value of the land, pursuant to the terms of the statute applicable in such cases (R. 468).

The judgment entered by Judge Moore in his division of the court in the Andrews case was to the same effect as that entered by Judge Davis in the Muschany case (R. 665).

Separate appeals were taken by the Government in both of said cases, after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Muschany case and at the trial of the Andrews case that the evidence offered in the trial of the Cailaway case should be considered in

evidence as far as applicable in the trial of said two last mentioned cases; and therefore the parties entered into a stipulation (R. 3) which was filed in the Court of Appeals, agreeing that a joint transcript of the record might be prepared and filed and used in that court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686). That record comprised 686 pages. Ten copies of it are filed herewith, it being deemed wholly unnecessary to burden the clerk's office with twenty copies, ten in this case and ten in the Andrews case in this court.

After the taking of all proper proceedings pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689); and on the 22nd day of December, 1943, said Court handed down an opinion entitled in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We deem it appropriate to refer a little more in detail to the evidence offered in the District Court. That offered in chief by the Government showed clearly that all proper proceedings had been taken by the Government to authorize the District Attorney to institute and prosecute proceedings for the condemnation of said lands and institution of the suits (R. 42-44).

Evidence offered by petitioners showed that prior to the institution of the suits for condemnation, and at the direction of the Quartermaster General, Lieutenant-Colonel R. D. Valliant of the Quartermaster Corps, in charge of the real estate branch of that department (R. 50), undertook the work of negotiating for the purchase of lands in said area, and was properly designated to make contracts for such purchases, the War Department being authorized to acquire lands for such purposes as that involved here, either by purchase at such price as in the opinion

of the Secretary of War was reasonable, or by condemnation (U. S. C. A., Tit. 50, Sec. 171).

The area involved was a very large one, embracing approximately 18,000 acres of land in St. Charles County, Missouri, something like 30 miles west of the City of St. Louis.

A man by the name of R. Newton McDowell came into the area in October or November, 1940, and began negotiating with landowners for option contracts on their respective lands in said area. Learning of the project, the landowners chose a committee to look after their interests. That committee telegraphed the Secretary of War at Washington, D. C., inquiring as to who was authorized to represent the Government in negotiating for the purchase of such lands, the landowners not being sure of the authority of McDowell. In reply to that telegram, the Secretary of War, on November 9, 1940, sent the following telegram to the chairman of said committee:

"Nov 9 110P

E R Sutton Citizens Committee
St Charles Mo

Reurtel Oct Twenty Eight Weldon Springs Mo. Area Has Been Approved by War Dept for Munitions Plant Site Stop Property Will Be Purchased by Mister R. Newton McDowell and Agents Representing Office of the QM General Stop Mr. McDowells Organization Directly Represents the Government

Stimson, Secy of War,
Wash DC" (R. 52-53)

Being thus assured of McDowell's authority to represent the Government, these petitioners and many other landowners entered into negotiations with McDowell and as the result of such negotiations the contract here involved was furnished to the petitioners by McDowell, was filled in by him and then signed by petitioners and turned over

to McDowell for him to forward to the War Department. The price agreed upon as the purchase price in the contract was $4,500.

In securing the option contract in question in this case, as in all other cases, printed blanks which had been prepared by an attorney for the War Department and furnished to McDowell were used by him (R. 308). All of them were on printed forms precisely alike, merely leaving spaces for the date, the description of the land in question, the price agreed upon and the signatures of the owners. The Muschany contract is set forth in full on pages 342-344, inclusive, of the record.

The offer set out in the option contract, in a lump sum, the price to be paid by the Government, and provided that out of it the owner should pay McDowell 5 per cent and all expenses of clearing the title (Rec. 342-344). It contained no provision whereby, after the Government accepted the offer, the amount to be paid by the Government or to be received by the owner or anyone else could be in any wise increased above the sum specified in the offer. When the Government accepted the offer the total cost was fully known and finally established.

The provision of the contract which gives rise to the question decided by the Court of Appeals was to the effect that 5 per cent of the purchase price fixed in said contract should be paid by the landowner to McDowell to cover his commission for services. No evidence in the record shows that the price of the Muschany land was agreed on, and that 5 per cent was added to make up the $4,500.00.

The contracts were designated as option contracts. McDowell had no authority to sign any of them, nor did he do so. He forwarded them to the office of the Secretary of War with his recommendation. The Quartermaster General had in his department experts who passed upon the contracts with relation to the prices and other features and then passed the contracts on to Col. Valliant, who was

a man of vast experience in such matters, having charge of 107 projects of similar character for the Government, totalling about $50,000,000.00. If a contract looked all right to him he signed an acceptance of it (R. 278), and one copy was then retained by him and one copy came back to the landowner, who then made a deed to his property and turned it over to the title company for approval. Immediate possession of the lands was given by the owners upon learning of the acceptance of their contracts by the Government (R. 342).

A large number of such contracts had been signed and many of the deeds had been passed and some of them had actually been recorded in the office of the Recorder of Deeds for St. Charles County, Missouri, and in a great many instances the contract prices had been paid to the landowners before the Government decided to deny the validity of any of the contracts. But when the Government had reached the conclusion that it would contest the contracts on February 7, 1941, it stopped payment on all other contracts for which the consideration had not yet been paid, including the one involved in this case (R. 82).

On the part of the Government evidence in rebuttal by men who claimed to be experts on land values was offered (though most of them resided far from the lands in question), and their estimates of the value of the Muschany land varied all the way from $1,250.00 to $2,500.00—an average of $1,972.00.

On the part of the petitioners, evidence was offered from witnesses, most of whom lived in the immediate vicinity of the lands, some of which showed the fair reasonable market value of the land in question to be $5,000.00, while some other estimates were for lesser figures, the lowest being $3,500.00—an average of $4,560.00 (see Judge Davis' memorandum, R. 451).

After all proper steps were taken by the Government this case was taken to the Court of Appeals.

In that Court the judgment of the District Court was reversed on the theory that the contract in each case was one for cost-plus-a-percentage-of-cost, and therefore void under the federal statute above cited (see opinion of Court of Appeals, R. 690 to 703), and the cause was remanded to the District Court *with directions to proceed with the case* as a condemnation suit, appointing commissioners, etc.

The Court of Appeals expressly exonerated from any charge of default or bad faith the Quartermaster Department to which the Secretary of War had delegated the performance of his duties in the purchase of the land.

Thereafter, on the 14th day of January, 1944, the petitioners' petition for a rehearing of said cause, which had been filed in due time pursuant to the rules of the Court of Appeals (R. 721), was overruled by said Court and its judgment thereby became final (R. 723).

An application to withhold the mandate of the Court for thirty days in order to permit these petitioners to apply to this Court for a writ of certiorari was sustained by the Court of Appeals by order entered on January 27, 1944 (R. 740).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides in effect that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari

that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was originally entered on December 22, 1943 (R. 703). A motion for a rehearing was duly filed by petitioners who were appellees in said court on January 5, 1944, within the time provided by the rules of said Court (R. 721), and said motion for a rehearing was denied by said Court of Appeals on January 14, 1944 (R. 723), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 18), which right was denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioners' petition for a writ of certiorari are:

1. Whether the contract in question is a contract made on the basis of cost-plus-a-percentage-of-cost.

2. Whether the contract designated as the option contract between the United States Government and the Muschanys, petitioners herein, is valid, or whether it is void because in violation of Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703).

3. Whether the Government is estopped to deny the validity of the contract.

4. Whether the Government ratified the contract.

5. Whether the act of the War Department in entering into the contract was an administrative act which cannot be inquired into by the courts.

6. Whether the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. Supp. 1171), was designed partially to repeal the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171), giving the Secretary of War certain powers necessary to the prompt prosecution of the war, and, if so, whether it should not be strictly construed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Court of Appeals construing an Act of Congress known as Public Act No. 703, enacted on July 2, 1940, places an erroneous construction upon said act and thereby deprives these petitioners of their rights under Section 171, U. S. C. A. 50, under which the Secretary of War had a right to use his discretion in accepting an option for lands which he deemed to be reasonable; said right having been exercised by said Secretary of War through its proper agent, and thereby having given to these petitioners a substantial right under the laws of the United States which was denied to them by said decision of the Court of Appeals.

Public Act No. 703 has no application to the contract involved in the Muschany case because said contract did not contain the elements necessary to bring it within that class of contract known as cost-plus-a-percentage-of-cost contracts, because:

(a) The inhibition in said Act of July 2, 1940, was not intended to apply to contracts for the purchase of real estate. The War Department, through its legal advisor, held that said act did not apply to purchases of real estate. See testimony of Col. Valliant (R. 287).

(b) There was no element of uncertainty or contingency involved in the commission to be paid the Government's agent, McDowell. That was definitely fixed when the option contract was accepted by Col. Valliant. The purpose of the provision in the Act of July 2, 1940, was to prevent frauds upon the Government, such as had frequently been perpetrated when the amount of the cost of a building or project was not known in advance and the commission to be paid the contractor could not, therefore, be determined in advance, and thus opportunities for stuffing pay rolls and cost of materials were seized upon by unscrupulous contractors.

2. The opinion of the Court of Appeals for the Eighth Circuit holding the contract herein invalid is squarely in conflict with the opinion of the U. S. Circuit Court of Appeals for the Seventh Circuit in the case of

U. S. v. Grace Evangelical Church,
132 Fed. (2d) 460,

the Court of the Seventh Circuit having held in that case that a contract identical with one in this case except as to date, names, description and price, was valid, while the Court of Appeals of the Eighth Circuit in this case held said contract invalid.

3. Public Act No. 703 (of July 2, 1940) has never been passed upon by this Court, and, therefore, there is no final authority as to the proper construction of the same by the highest court in the land, from which all circuit courts of appeals can determine the proper construction of said act, and by following the same avoid confusion in different circuits.

4. The questions here presented are of very great public importance—so great as to justify the settling of the same by this Court, for the following reasons, to wit:

(a) Col. Valliant's testimony (R. 278) shows that he had 107 projects of similar character in charge and that they were widely scattered. In many instances he had made purchases on precisely the same basis as that involved in this case, and the money had been paid to the landowners by the Government.

(b) In negotiating for lands for the project in St. Charles County, Missouri, on which a TNT plant was to be erected, approximately 270 such contracts were made and it appeared from the evidence that purchases had been made on the basis of those contracts with approximately 129 landowners (R. 282), and paid for. Large sums of money were thus paid out by the Government.

(c) A large number of cases in which similar contracts were made are now pending in the District Court where the case in question was tried. A great amount of money is involved in these unsettled claims.

(d) The Government, if the decision in this case by the Court of Appeals is allowed to stand, may feel that it is its duty to institute suits to recover back large sums of money from many landowners with whom settlements were made on the basis of such contracts. If the decision of the Court of Appeals is right, then the Government has unlawfully paid out enormous sums of money in many cases. If the decision is wrong, then it deprives these landowners of money to which they are justly entitled.

Contracts of a similar character having been made in various states, the question of the validity of such contracts is likely to come before various other courts of appeals for decision. Not only the district courts in other circuits, but other circuit courts of appeals as well will, if the decision in this case is allowed to stand, find themselves confronted with conflicting decisions from the Seventh and Eighth Circuit Courts of Appeals, and if this writ is not

granted and the matter is not settled by this Court such a state of affairs will lead inevitably to much confusion on the part of the bench and the bar in the United States courts.

5. A few days before the decision by the Eighth Circuit Court of Appeals in this case was rendered the Comptroller General of the United States, Hon. Lindsay C. Warren, rendered a decision on December 28, 1943, designated as B-38,322, in a letter addressed to Col. C. H. Farrish, F. D. U. S. Army, in which he decided that in the contract there involved, which was otherwise a contract for cost-plus-a-percentage-of-cost, as it was provided that the entire cost should not exceed $6,000, was valid, as it did not fall within the class of cases in which Congress attempted to remedy an evil by prohibiting cost-plus-a-percentage-of-cost contracts. Petitioners did not know of this ruling until after their petition for a rehearing had been denied by the Court of Appeals.

It is evident therefore that both the War Department and the Comptroller General entertained the same idea for which we contend and which was found to be correct by the District Court.

6. Under the evidence revealed by the record the Government is estopped to deny the validity of the contract.

7. The Government ratified the contract.

8. The act of the Secretary of War in entering into the contract in question was an administrative act which cannot be inquired into by the courts.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that

the said opinion and judgment of said Court of Appeals in the case of United States of America, Appellant, versus James Karl Muschany and Vera Muschany, Appellees, No. 12,561, in said court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed, and the petitioners have such other relief as to this Court may seem appropriate.

WILLIAM R. GENTRY,
Attorney for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cases entitled as follows: "No. 12561. United States of America, Appellant, versus James Karl Muschany and Vera Muschany, Appellees; and No. 12562. United States of America, Appellant, versus William L. Andrews and Bertha L. Andrews, Appellees," which petitioners here seek to have reviewed, has not yet been reported, but appears on pages 691 to 703, inclusive, of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for writ of certiorari, and in the interest of brevity they are not repeated here. Reference will be made to such facts where necessary in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Court of Appeals erred in holding that the option contract between the Government and the Muschanys is of the class known as cost-plus-a-percentage-of-cost contracts, because its provisions clearly distinguish it from such contract.

II.

The Court of Appeals erred in holding that the provisions of Public Act No. 703, relating to contracts based on cost-plus-a-percentage-of-cost, rendered said option contract invalid.

III.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

IV.

The Court of Appeals erred in not holding that the Government ratified said option contract and is bound thereby.

V.

The Court of Appeals erred in not holding that by exercising the authority to enter into said contract, such authority being expressly given by law to the Secretary of War, who acted through his proper agent, the said Secretary of War did an administrative act which cannot be inquired into by the courts in the absence of fraud.

VI.

The Court of Appeals erred in holding in effect that Public Act No. 703, being part of a mere appropriation act, limited the powers given to the Secretary of War by an act that had been on the statute books since 1917 (approximately twenty-three years), to wit: "Sec. 171, U. S. C. A. Tit. 50," and in giving the provisions of said Public Act No. 703 a very broad and liberal construction instead of giving the same a very strict construction.

SUMMARY OF THE ARGUMENT.

I.

The provisions of the option contract in question clearly distinguish it from a contract made on the basis of cost-plus-a-percentage-of-cost. All of the important elements necessary to make a contract of that character are absent from the contract in question, notably all language tending to create an uncertainty whatever in the exact amount finally to be paid by the Government. All of the evils which were present under the old system of contract whereby contractors were employed to do construction work, the amount of which was unknown in advance and commissions on which would consequently be unknown in advance and on account of which Public Act No. 703 was passed, are entirely absent from the contract here involved.

II.

The option contract was not prohibited by the provisions of Public Act No. 703, and, therefore, was not violative thereof.

III.

All defenses which are available against an individual, including the defense of estoppel, are available against the Government in cases like this, wherein contracts are entered into by it in its proprietary capacity, not in its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Nat'l Exchange Bank of Baltimore, 270 U. S. 527;
U. S. v. Bethlehem Steel Co., 315 U. S. 289, 62 Sup. Ct. R. 581;
U. S. v. Wright, 78 U. S. 648;
Bartlett v. Kane, 57 U. S. 263;
U. S. v. Arrendondo, 31 U. S. 691;

Belcher v. Linn, 65 U. S. 508;
U. S. v. Fuller, 14 Fed. (2d) 813;
England Bank v. U. S., 262 Fed. 121;
Pan-American Co. v. U. S., 273 U. S. 456;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673;
The Falcon, 19 Fed. (2d) 108;
State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver & R. G. W. Ry. Co., 16 Fed. (2d) 374.

The Secretary of War having authority under U. S. C. A., Tit. 50, Sec. 171, to enter into contracts for the purchase of land for such purposes as that involved in the TNT project, and having entered into such a contract, the Government is estopped to deny the validity of such contract which he made, for all the facts and circumstances as to the manner of making the contract were fully known to the War Department's agents and with such knowledge the Government took and held possession of the land.

IV.

By its acts, after having full knowledge of the contract and all the facts and circumstances connected with the making thereof, the Government ratified said contract and could not now rescind the same, even if the contract had been fraudulently conceived and if such fraud had brought about the execution thereof.

First Nat'l Bk. of K. C. v. Seldomridge, 271 Fed. 561;
City of Findlay v. Pertz, 66 Fed. 427;
Ebel v. Roller, 21 S. W. (2d) 214;
In re: Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
Michigan State Bank v. Hastings, 1 Douglass (Mich.) 225;
U. S. v. North American etc. Co., 253 U. S. 330, 40 S. Ct. 518, l. c. 520.

V.

The act of the War Department in entering into the option contract was an administrative act, the doing of which was delegated by law to that department, under the Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. A. 171, which gave the Secretary of War full power and authority to make purchases of real estate for munitions plants, accepting offers for the sale of real estate to the Government for such purposes when in the opinion of the Secretary of War the price was reasonable.

Many similar acts by heads of various departments of the Government have been held to be administrative acts with which the courts would not and should not interfere, unless the discretion of such department representatives was abused or they were guilty of fraud, of which there is no evidence in this case, as has been expressly held by all three of the district judges and by the Court of Appeals.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. Rep. 427;
Barnidge v. U. S., 101 Fed. (2d) 295;
U. S. v. Threlkeld, 72 Fed. (2d) 464;
Shoemaker v. U. S., 147 U. S. 282, 13 S. Ct. Rep. 361;
U. S. v. Wright, 78 U. S. 648;
Bartlett v. Kane, 57 U. S. 263;
Belcher v. Linn, 65 U. S. 598;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14;
Lee v. U. S., 61 App. D. C., 153, 58 Fed. (2d) 879.

VI.

The effect of the decision of the Court of Appeals is that the Act of July 2, 1940 (Public Act No. 703) repealed the essential provisions of the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171) to the extent of practically destroying certain of the powers vested in the Secretary of War

by the last-mentioned act, which had been on the statute books for approximately twenty years, while Public Act No. 703 was a mere incident to and part of an appropriation act, which, in so far as it had any tendency to repeal or limit the effects of the old general statute cited, should be most strictly construed, while the Court of Appeals in its opinion gave said Public Act No. 703 a very broad construction.

ARGUMENT.

I and II.

The Court of Appeals held that the contracts with the landowners violate the prohibition against the use of a "cost-plus-a-percentage-of-cost" system of contracting contained in Public Act No. 703.

A cost-plus-a-percentage-of-cost contract is a well-recognized form of contract. **It means just what its name implies.** In such a contract one party agrees to pay the other party his cost of producing the thing desired and also agrees to pay a percentage of such cost for the services rendered by the producing party. Such a contract requires the presence of the following essential elements:

(a) The contract provides for payment **by the first party** of a base consideration **to the second party.**

(b) The base consideration is the actual cost to the second party of performing the contract.

(c) **The base consideration is not fixed in amount at the time of the execution of the contract** and is not determined until the thing desired has been constructed or produced.

(d) The contract also provides for the payment by the first party of an additional consideration or fee to the second party in the form of a percentage of the base consideration.

(e) The fee is for the services of the second party in the performance of the contract **and is paid to him by the first party.**

(f) **The fee is not fixed in amount at the time of the execution of the contract,** nor can it then be computed, for it consists in a fraction of the base consideration, which itself is not then known.

Though this method of contracting is foreign to contracts for the purchase of land, let us see if the contracts in suit comply with the above requirements.

(a) The land contracts do not contain any condition for the payment of a base consideration by the Government to the landowner, but provide for the payment of a single sum, the agreed price of the land, which was definitely known and clearly stated in the contract. The Government undertook to circumvent this difficulty by penetrating the face of the contracts by contending that since, in some instances, the landowner added McDowell's fee of 5 per cent to the net figure that the landowner demanded for his property, the Government in effect paid the landowner a base consideration in the net figure demanded by the landowner and, in addition, a fee to McDowell in the form of a percentage of the base consideration. It should be recalled that there was no proof that McDowell's commission was added to the landowner's net figure in any of the three cases tried. Whatever was done in other cases, of course, does not affect this case.

Upon acceptance of an offer from a landowner by the Government, it was obliged to pay such landowner the agreed price, and not obliged to pay McDowell anything. Suppose a judgment should be entered in the Muschany case in favor of the landowner for the amount of the contract — whom, then, could McDowell sue to recover his commission: the landowner or the Government? The answer, obviously, is the landowner, and the landowner only. Thus, whatever method was employed by the contracting parties in arriving at the agreed price, **as a matter of law the Government was obliged to pay only the landowner the agreed price for his land, and the landowner was obliged to pay McDowell.**

But even if each landowner had added McDowell's commission to his net figure, and even if the Government's acceptance of the price offered had amounted to its pay-

ing McDowell's fees, this would not make the contracts of purchase cost-plus-a-percentage-of-cost contracts, because:

(b) The consideration to be paid by the purchaser on the land contracts in suit is not the actual cost to the other party of the thing desired, but is the sum for which the landowners offered to sell their land and which the Secretary of War deemed reasonable.

(c) The consideration to be paid for the land in the land contracts was fixed in amount at the time of the execution of the contracts. There was no uncertainty or contingency of any kind connected with it.

(d) and (e) The contracts do not provide for the payment by the first party of an additional consideration or fee to the second party. As has already been said, they provide for the payment of a single consideration or sum to the second party. The fee, in the form of a percentage of the consideration of the contract is to be paid by the landowners to a person not a party to the contract, to wit, McDowell. But whether McDowell's fee is paid by the landowners, as required by the contract, or is actually paid by the Government, as contended by the Government, the fee is not paid by one party to the contract to the other party thereto, but is paid to a third person.

(f) Since the contracts provide for the payment of an agreed sum to the purchaser, the fee based thereon is fixed in amount at the time of the execution of the contract. It is wholly different from a fee to be figured later on an amount then unknown.

The primary reason for the objection in Congress to the cost-plus-a-percentage-of-cost form of contract was that in such contracts the fee for services was not fixed in amount at the time of the execution of the contract and depended upon the cost of performing the contract incurred by the contractor, a sum wholly unknown at that time, and which

could easily be arrived at later by gross frauds in stuffing pay rolls and other costs of construction or manufacture.

The essential iniquity of the cost-plus-a-percentage-of-cost method of contracting is that there is no definite ascertainment of the extent of the Government's liability under such a contract at the time of the execution of the same. On the contrary, the Government merely agrees to pay the cost of performing the contract, and to pay, in addition, a percentage of that cost to the other party for his services in performing the same. It is obvious that it is in the interest of the latter party to increase his cost of performing, as his fee, based on that cost, will be proportionately larger. But the contracts in suit do not create this iniquitous situation. **The amount to be paid the landowner is definitely fixed at the time of the execution of the contract**, so the Government knows definitely what its liability is upon the contract from the time of the execution. Furthermore, if it be assumed, for the purpose of argument only, that under the contracts as performed the Government paid McDowell's fee, **this fee, too, was fixed in amount at the time of the execution of the contracts.** Therefore, the contracts with the landowners do not, either in law or in spirit, violate Public Act No. 703, because they are not cost-plus-a-percentage-of-cost contracts.

In holding that the option did not violate the prohibition against the cost-plus-a-percentage-of-cost provision of the Act of July 2, 1940, District Judge Davis, in his opinion (46 Fed. Supp., l. c. 926; R., l. c. 453-454), said:

> "The term cost-plus is generally used in connection with construction contracts and the legal staff of the War Department advised Colonel Valliant that the clause was limited to such agreements and did not apply to contracts for the acquisition of land. The term means that a party who provides facilities, whatever they may be, will be paid his cost therefor and in addition will be paid a percentage of that cost for

> his services. Both items are payable to the same party and by the same party. The amount of each payment is unknown at the time of the execution of the contract. It is the uncertain nature of both items, particularly of the plus payment, that gave rise to the opposition to cost-plus-a-percentage contracts. The option contract in this case required the Government to make, not two, but one payment and the amount of that payment was not unknown, but known and written into the contract at the time of its execution. If it be assumed that actually the Government was paying the commission, then the amount was not uncertain but was certain at the time the contract was approved. If the payment of the land owned is to be regarded as the cost element and the commission to the agent is to be regarded as the plus element, as is argued, then the option agreement is not a cost-plus-a-percentage contract but is in reality a fixed fee agreement, which is expressly authorized by the statute."

Finally, it is obvious that the cost-plus-a-percentage-of-cost method of contracting could not be employed in the acquisition of land alone. Col. Valliant testified that he had been advised by attorneys in his department that Public Act No. 703 applied only to construction contracts (R. 287). It is probable that he meant to include contracts for the production of war materials as well as construction contracts.

The construction that Public Act No. 703 is limited to production or construction contracts, and not to the acquisition of land, excepting only in the limited sense contained within the parenthesis in the act, is borne out by an examination of the purposes of the act. This congressional enactment was passed to expedite the preparation of the national defense by removing from the Secretary of War the necessity of complying with certain restrictions theretofore imposed upon him by other statutes. An examina-

tion of these restrictions imposed by other statutes upon the Secretary of War indicates that they apply only to construction or production contracts. For example, the restriction requiring the necessity of advertising before entering into contracts necessarily applies only to construction or production contracts. It could not apply to the acquisition of a specific piece of land by the Government, because only one person owns that land, and the element of competitive bidding guaranteed by advertisements and bids cannot be applied to such a situation. Furthermore, it is impossible for either the cost-plus-a-percentage-of-cost or the cost-plus-a-fixed-fee method of contracting to apply to a contract which is devoted solely to the acquisition of land by the Government under Section 171, Title 50, U. S. C. A., for the very obvious reason that land is not acquired under this section on the basis of its cost to the owner. On the contrary, it is acquired on the basis of the reasonable value of the land at the time of the execution of the contract, as determined by the Secretary of War.

Therefore, Public Act No. 703 does not apply to the acquisition of land only, as in the contracts in suit.

These contracts were prepared by the Government, through the legal advisors in the War Department (R. 308); **offers were secured from the landowners, and the contracts accepted under an arrangement set up by the Government.** The landowners neither prepared the contracts nor set up the organization for the acquisition of the land. While the offers were being secured, the Government had every opportunity to change its method of land acquisition. By the contract between the Government and McDowell the former had the right to scrutinize his deals by inspecting and taking copies of his records evidencing his transactions. The Government sent a Department of Justice agent out to St. Charles for two weeks in Novem-

ber (R. 247), who left satisfied. Apparently the Government also was satisfied with the arrangements set up by Col. Valliant's office, because they were not changed. The Government could have ceased purchasing altogether. It was not like a private buyer who had to induce the purchaser to sell, or fail to acquire the property. The Government could condemn the lands if it failed to secure acceptable offers, and it threatened the landowners with doing just this in McDowell's letter to them announcing the project. This peculiarly advantageous position of the Government was well described by Mr. Justice Murphy in his concurring opinion in United States v. Bethlehem Steel Corporation, supra, in which he referred to the Government as enjoying "* * * both an actual and potential arsenal of powers adequate to protect its interests in dealings with private persons." (See 62 S. Ct., l. c. 592, 315 U. S., l. c. 311).

III.

The act of the Government in entering into the option contract was done in its **proprietary** capacity as distinguished from its **governmental or sovereign capacity**. Had the Government resorted to eminent domain proceedings in the first place to acquire the land in question, it would have done so in its sovereign capacity. But it saw fit to enter into contracts with the landowners for the purchase of the lands without suit, as authorized by statute, and in making such contracts it acted in its proprietary capacity. When the United States enters into a contract in such capacity it will be enforced against the United States just as a contract of similar character would be enforced against an individual person, and all defenses, equitable as well as legal, which would be available to such individual, including the doctrine of estoppel, may be invoked by the individual party to such contract, when an attempt

is made by the Government as plaintiff to have such contract declared invalid.

U. S. v. Nat'l Exchange Bk. of Baltimore, 270 U. S. 527, 46 S. Ct. 388;
Bartlett v. Kane, 57 U. S. 263, 14 L. Ed. 931;
U. S. v. Wright, 78 U. S. 648, 20 L. Ed. 188;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
U. S. v. Arrendondo, 31 U. S. 691, 8 L. Ed. 547;
Belcher v. Linn, 65 U. S. 508, 16 L. Ed. 754;
U. S. v. Geo. A. Fuller, 14 Fed. (2d) 813;
England Nat'l Bk. of U. S., 282 Fed. 121;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

Upon the authority of the Dayton Airplane Company case and others referred to, Col. Valliant, as representative of the Secretary of War, had wide discretionary powers in the execution of the contract in question. Therefore, the doctrine of estoppel may be invoked against the Government in the enforcement of this contract and, upon the authority of other cases, referred to under this heading, rules relating to the enforcement of contracts generally will be applied against the Government.

In the Dayton Airplane case, supra, it appeared that the Government had contracted with the airplane company for the production of planes. The Court said (21 Fed. [2d] 673, l. c. 674):

> "The Government was acting by the Secretary of War in a national emergency of the first class. His discretion was unlimited; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it. Rules of estoppel and fair dealing apply in full force as with individuals."

See, also:

State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver and Rio Grande Western Ry. Co., 16 Fed. (2d) 374.

In the case at hand the Government submitted itself as plaintiff to the jurisdiction of the District Court for the Eastern Division of Missouri by commencing the eminent domain proceedings therein; and when the defendants (landowners) in this case filed their answer asserting the land contracts, the Government in its second amended reply resorted to the equity powers of the Court by asking for a rescission of the contract, alleging that it was induced by fraud and mistake. Clearly, then, these petitioners, as defendants, had the right to set up equitable defenses, including the defense of estoppel.

With full knowledge on the part of the War Department, through Col. Valliant, its agent, the War Department took possession of the land in question pursuant to the contract which its representative had signed, and continued to exercise exclusive possession and control of the same until April 7, 1941, without making any claim of fraud in the procuring or execution of the contract, and during that time paid many thousands of dollars to other landowners in the area under the terms of their contracts which had been procured precisely as the contract in question was, and which were in all essential respects duplicates thereof.

Petitioners had surrendered their land and had thus suffered loss, relying upon the contract which the Government had made with them, and it is only just and fair now that the Government should be held to be estopped from denying the validity of that contract.

IV.

Even if the Government had proved that the petitioners participated in a fraud upon the Government in procuring the option contract in question (which the Government wholly failed to do) it could not now rescind its contract because it has, with full knowledge of all the facts, ratified the same.

That the Government had such knowledge is clearly revealed by the record, especially by the testimony of Col. Valliant, to which various references have been made herein (R. pp. 276-308). The Government, through Col. Valliant, signed the written acceptance of the Muschany contract on the 3rd day of December, 1940. It then took immediate possession of the land and has held it ever since that time. It continued to hold possession of the land under said contract, with full knowledge as aforesaid, during all that time until April 7, 1941, before it instituted suit to condemn the land and filed its notice of taking.

The doctrine of ratification applies to a sovereign as well as a private individual, when invoked for the purpose of enforcing a contract entered into by the sovereign.

Re Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
City of Findlay v. Pertz, 66 Fed. 427;
U. S. v. North Atlantic etc. Co., 253 U. S. 330, 40 Sup. Ct. 518, l. c. 520.

If any party to a contract could ever be held to have ratified the same, the Government ratified the contract in question.

V.

The act of the Secretary of War in purchasing the petitioners' land by contract, instead of acquiring it by condemnation, was a discretionary act performed by an executive or administrative officer in charge of a department of the United States, and therefore the courts will not review or interfere with such act, absent proof of abuse of discretion or fraud, and there is no evidence in the Muschany case tending to show either abuse of discretion or fraud.

This rule has been applied to many different kinds of acts, not only in the acquisition of land for war purposes,

but to acts of secretaries of other departments of the Government as well. The rule is universally recognized.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. R. 427;
U. S. v. Meyer, 113 Fed. (2d) 387 (certiorari denied, 311 U. S. 706, 61 S. Ct. 174);
U. S. v. Certain Lands in the Town of Narragansett, 145 Fed. 654;
U. S. v. Threlkeld, 72 Fed. (2d) 464, certiorari denied 293 U. S. 620, 55 S. Ct. 215;
Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361;
Decatur v. Paulding, 39 U. S. 497, 10 L. Ed. 559;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
Lee v. U. S., 58 Fed. (2d) 879;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14.

U. S. C. A. Title 50, Sec. 171, gives the Secretary of War authority to purchase real estate for the construction and operation of plants for the manufacture of explosives and other munitions of war and contains a proviso in these words: "Provided, that when the owner of such land, interest or rights, pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay." It is presumed that Congress uses words for some purpose. If the intention had been to provide that the Secretary of War in making such purchases should be limited to the fair, reasonable market value of lands, Congress would certainly have said so instead of using the words "which in the opinion of the Secretary of War shall be reasonable." Many things may be taken into consideration by the Secretary of War in making such contracts, which could not be taken into consideration by a jury under instructions of a court in a condemnation proceeding.

But whatever may have been taken into consideration in making option contracts with other landowners, there is no showing whatever of the consideration of anything except the fair, reasonable market value of the land in the Muschany case, for the bare land itself was purchased at a price which, in the opinion of the Secretary of War, through his duly authorized agents, was considered reasonable, and the petitioners showed by most substantial evidence that the fair, reasonable market value of their land was as much as that which the Secretary of War contracted to pay therefor.

VI.

In obtaining and accepting the offers of petitioners for the sale of their farms the Secretary of War was acting under the powers expressly granted by the Act of July 2, 1917 (C. 35, 40, Stat. 241, Title 50 U. S. C. A., Sec. 171), which provides:

> "that when the owner of such land, interest or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay * * *."

The District Courts and the Circuit Court of Appeals have exonerated the representatives of the Secretary from any bad faith in the transaction, from which it is a fair inference that the Secretary performed his duty and found the price reasonable before accepting the offer (R. 282). **Such is the presumption and the evidence as well.**

However, the Circuit Court of Appeals held that the contract resulting from the offer and acceptance was void because it violated the Act of July 2, 1940 (C. 508, 54 Stat. 712), which, after authorizing certain types of construction and purchases by the Secretary, provides:

> "that the cost-plus-a-percentage-of-cost system of contracting shall not be used **under this section;** but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." (Emphasis supplied.)

The prohibition is limited to activities "under this section" and there is grave doubt whether it was intended to affect purchases of land under the earlier act, under which the Government buys from the farmer if he submits an offer which the Secretary finds reasonable. The farmer is not a "contractor," his offer is not "cost" and the Secretary cannot buy unless he finds the offer reasonable. We think the Congress did not intend to refer to this situation when it prohibited the cost-plus-a-percentage-of-cost system in transactions under the Act of July 2, 1940. And the legal advisers of the Secretary of War were of the same opinion (R. 287).

In addition, the repeal of statutes by implication is not favored. The Act of 1940 can be given full effect by limiting it to transactions "under this section" without extending it to the partial repeal of the 1917 Act. Such was the view taken by the District Court in the case of In re Military Training Camp, 260 Fed. 986, in an almost identical situation.

If it be held that the Act of July 2, 1940, was intended to limit the powers of the Secretary under the earlier statutes, it would seem reasonable that, since the powers granted in the earlier statute were obviously necessary to the effective prosecution of the war, the limiting statute should be strictly construed and given no further effect than Congress expressly required.

The Circuit Court of Appeals has overlooked this sound rule of construction. As its opinion shows, it found that the system of purchase followed by the Secretary of War

sometimes resulted (though not in these cases) in some of the evils frequently exhibited by the cost-plus-a-percentage-of-cost system. So finding, the Court decided that the system used by the Secretary **was** a cost-plus-a-percentage-of-cost system and therefore prohibited by the Act of July 2, 1940.

As we have elsewhere shown, the total cost to the Government under the contract was both known and finally determined at the time the Secretary of War signed it, and thereafter the cost to the Government could not be increased by anyone. This is never true in the case of a cost-plus-a-percentage-of-cost contract, the distinguishing features of which are that the total cost cannot be determined at the time the contract is signed; that the Government loses control over such cost at the time the contract is signed.

It is submitted that the Circuit Court of Appeals erred in construing the Act of July 2, 1940, as limiting the powers of the Secretary of War under the Act of July 2, 1917, and in holding that the contract in question violated the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940.

In view of all of the foregoing arguments and authorities, it is respectfully submitted that the decision of the Court of Appeals herein is, upon principle, out of accord with the applicable decisions of this Court cited above, though the precise question as to the proper construction of Public Act No. 703 in such a case is a question that has never been decided by this Court; that such question is one that should be decided by this Court; that the case is one of great public importance; that in order to avoid conflicts in the decisions of courts of appeals throughout the United States, this Court should issue its writ as

prayed for herein, pass upon the various questions raised —including the proper construction of Public Act No. 703 —and thus enable many district courts and various courts of appeals to render decisions in many cases to come before them which will be harmonious and which will result in justice to all litigants interested therein.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	}	No. [illegible] 32

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF BY THE PETITIONERS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now William M. Andrews and Bertha L. Andrews and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 22nd day of December, 1943, in the case lately pending in said Court of Appeals, entitled United States of America, Appellant, versus William M. Andrews and Bertha L. Andrews, Appellees, bearing number 12,562, of causes on the docket of said Circuit Court of Appeals, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of these petitioners and against said respondent, which said judgment of the said

Court of Appeals became final on the 14th day of January, 1944, by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of said Court of Appeals in the above-mentioned case which petitioners here seek to have reviewed has not yet been reported, but appears on pages 690 to 703 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT.

This suit was a condemnation suit against these petitioners and their tract of land No. 19, alleged to contain 94.46 acres of land in St. Charles County, Missouri, for the acquiring of fee-simple title to said land by the United States for use by the War Department as a site for a TNT Manufacturing Plant (R. 478-485). A declaration of taking was filed and judgment entered thereon in favor of the United States on April 15, 1941 (R. 485-491).

These petitioners filed an answer to the condemnation petition on June 2, 1941 (R. 491-498), and an amended answer on February 27, 1942 (R. 498-505), in which they alleged that prior to the institution of the condemnation suit the United States Government had entered into a contract with these petitioners to purchase said land for a price of $12,000.00. A copy of said contract, marked "Exhibit A," and made a part thereof, was attached to said amended answer and may be seen as set forth in the original answer (R. 492-495).

The terms and provisions of the contract were set forth in said amended answer and the petitioners prayed the Court that commissioners be not appointed as prayed by plaintiff's petition, and that the condemnation award be fixed at the contract price and judgment entered thereon (R. 505).

An amended reply to the amended answer was filed on April 3, 1942 (R. 506), in which the Government alleged that the purchase contract was fraudulent because of certain alleged fraudulent representations, contrary to public policy and violative of a provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix, Sec. 1171, known as Public Act No. 703.

On account of the large number of cases wherein the validity of the contracts was involved, and the importance of said cases, the three District Judges, sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet, and he made the rulings on the evidence offered and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 Acres of Land in St. Charles County, Mo., 45 Fed. Sup., p. 1016.) The other two Judges went to their respective court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases, and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of that provision of the statute of the United States known as the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A., App. Sec. 1171), above cited, which act removes certain restrictions on the powers of the Secretary of War and gives certain additional powers to him and then prohibits him from using the cost-plus-a-percentage-of-the-cost system of contracting in contracts entered into by him under that act.

Judge Davis, in the Muschany case, decided that the said statute did not apply as the contract in question was not under the cost-plus-a-percentage-of-the-cost system of contracting and therefore did not violate that statute. He also found that the contract was valid and binding, and

that there was no evidence tending to show that it was procured by fraud. Judge Davis filed a written opinion, which is set forth in the record herein, pages 449-460 (for decree see R. 466-468). See U. S. v. Certain Lands in St. Charles County, Mo., 46 Fed. Supp. 920.

Judge Moore held the contract in the Andrews case valid, and adopted, as far as applicable, the opinion which had been rendered by Judge Davis in the Muschany case. Judge Moore's opinion is set forth in the record herein, pages 656-657 (for decree in that case see R. 663-665).

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land, and that commissioners should be appointed to fix the value of the land in question in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein were entitled to have judgment entered on the contract for the sum fixed therein, to wit, $4,500.00, together with interest on the sum of money representing the difference between the amount of estimated provisional just compensation deposited in the registry of the court and the contract price of $4,500.00, pursuant to the terms of the statute applicable in such cases (R. 468).

The judgment entered by Judge Moore in his division of the court in the Andrews case also fixed the compensation at the contract price of $12,000.00, together with interest on the amount of the excess of that price over the amount of the estimated provisional just compensation deposited in the registry of the court (R. 665).

Separate appeals were taken by the Government in both of said cases after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Andrews case and also at the trial of the Muschany case that the evidence

offered in the trial of the Callaway case should be considered in evidence as far as applicable in the trial of said two last-mentioned cases, and, therefore, the parties entered into a stipulation (R. 3), which was filed in the Court of Appeals, agreeing that a joint transcript of the record might be prepared and filed and used in that court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686). That record comprised 686 pages. Ten copies of it are filed herewith, it being deemed wholly unnecessary to burden the clerk's office with twenty copies, ten in this case and ten in the Andrews case, in that court.

After the taking of all proper proceedings, pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689), and on the 22nd day of December, 1943, said Court handed down an opinion entitled in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We deem it appropriate to refer a little more in detail to the evidence offered in the District Court. That offered in chief by the Government showed clearly that all proper proceedings had been taken by the Government to authorize the District Attorney to institute and prosecute proceedings for the condemnation of said lands and it showed the institution of the suits (R. 42-44).

Evidence offered by petitioners showed that prior to the institution of the suits for condemnation, and at the direction of the Quartermaster General, Lieutenant-Colonel R. D. Valliant of the Quartermaster Corps, in charge of the real estate branch of that department (R. 50), undertook the work of negotiating for the purchase of lands in said area, and was properly designated to make contracts for such purchases, the War Department being authorized to acquire land for such purposes as that involved here, either

by purchase at such price as in the opinion of the Secretary of War was reasonable, or by condemnation (U. S. C. A., Tit. 50, Sec. 171).

The area involved was a very large one, embracing approximately 18,000 acres of land in St. Charles County, Missouri, something like thirty miles west of the City of St. Louis.

A man by the name of R. Newton McDowell came into the area in October or November, 1940, and began negotiating with landowners for option contracts on their respective lands in said area. Learning of the project, some landowners chose a committee to seek certain information. That committee telegraphed the Secretary of War at Washington, D. C., inquiring as to who was authorized to represent the Government in negotiating for the purchase of such lands, the landowners not being sure of the authority of McDowell. In reply to that telegram, the Secretary of War, on November 9, 1940, sent the following telegram to the chairman of said Committee:

"Nov 9 110P

E R Sutton Citizens Committee
"St. Charles Mo

Reurtel Oct Twenty Eight Weldon Spring Mo. Area Has Been Approved by War Dept for Munitions Plant Site Stop Property Will Be Purchased by Mister R. Newton McDowell and Agents Representing Office of the QM General Stop Mr. McDowells Organization Directly Represents the Government

Stimson, Secy of War,
Wash DC"

(R. 52-53.)

Being thus assured of McDowell's authority to represent the Government, these petitioners and many other landowners entered into negotiations with McDowell or his agents, and as the result of such negotiations the contract

here involved was furnished to the petitioners by McDowell, or his agents, already filled in and then signed by petitioners and turned over to McDowell for him to forward to the War Department. The price agreed upon as the purchase price in the contract was $12,000.00.

In securing the option contract in question in this case, as in all other cases, printed blanks which had been prepared by an attorney for the War Department and furnished to McDowell were used by him (R. 308). All of them were on printed forms precisely alike, merely leaving spaces for the date, the description of the land in question, the price agreed upon and the signatures of the owners. The Andrews contract is set forth in full on pages 492-495, inclusive, of the record.

The offer set out in the option contract, in a lump sum, the price to be paid by the Government, and provided that out of it the owner should pay McDowell 5 per cent and should pay all expenses of clearing the title (Rec. 493-494). It contained no provision whereby, after the Government accepted the offer, the amount to be paid by the Government or to be received by the owner or anyone else could be in any wise increased above the sum specified in the offer. When the Government accepted the offer the total cost was fully known and finally established.

The provision of the contract which gives rise to the question decided by the Court of Appeals was to the effect that 5 per cent of the purchase price fixed in said contract should be paid by the landowner to McDowell to cover his commission for services. No evidence in the record shows that the price of the Andrews land was agreed on, and that 5 per cent was added to make up the $12,000.00. On the contrary, the evidence shows that Andrews considered only replacement value (R. 549), and first signed an option on the basis of $150.00 per acre, and then, after negotiating with Williams, McDowell's agent, signed another option on the basis of $125.00 per acre, which was accepted (R. 550).

The contracts were designated as option contracts. McDowell had no authority to sign any option, nor did he do so. He forwarded them to the office of the Secretary of War with his recommendation. The Quartermaster General had in his department experts who passed upon the contracts with relation to the prices and other features and then passed the contracts on to Col. Valliant, who was a man of vast experience in such matters, having charge of 107 projects of similar character for the Government, totalin, about $50,000,000.00. If a contract looked all right to him he signed an acceptance of it (R. 278), and one copy was then retained by him and one copy came back to the landowner, who then made a deed to his property and turned it over to the title company for approval. Immediate possession of the lands was given by the owners upon learning of the acceptance of their contracts by the Government (R. 555).

A large number of such contracts had been signed, and many of the deeds had been passed, and some of them had actually been recorded in the office of the Recorder of Deeds for St. Charles County, Missouri, and in a great many instances the contract prices had been paid to the landowners before the Government decided to deny the validity of any of the contracts. But when the Government had reached the conclusion that it would contest the contracts on February 7, 1941, it stopped payment on all other contracts for which the consideration had not yet been paid, including the one involved in this case (R. 82).

After all proper steps were taken by the Government this case was taken to the Court of Appeals.

In that court the judgment of the District Court was reversed on the theory that the contract in each case was under and pursuant to the cost-plus-a-percentage-of-cost system of contracting, and therefore void under the federal statute above cited (see Opinion of Court of Appeals, R. 690 to 703), and the cause was remanded to the District

Court with directions to proceed with the case as a condemnation suit, appointing commissioners, etc.

The Court of Appeals expressly exonerated from any charge of default or bad faith the Quartermaster Department, to which the Secretary of War had delegated the performance of his duties in the purchase of the land.

Thereafter, on the 14th day of January, 1944, the petitioners' petition for a rehearing of said cause, which had been filed in due time pursuant to the rules of the Court of Appeals (R. 737), was overruled by said Court and its judgment thereby became final (R. 739).

An application to withhold the mandate of the Court for thirty days in order to permit these petitioners to apply to this Court for a writ of certiorari was sustained by the Court of Appeals by order entered on January 25, 1944 (R. 741).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was

originally entered on December 22, 1943 (R. 704). A motion for a rehearing was duly filed by petitioners, who were appellees in said court on January 6, 1944, within the time provided by the rules of said court (R. 737), and said motion for a rehearing was denied by said Court of Appeals on January 14, 1944 (R. 739), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 498), which right was denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioners' petition for a writ of certiorari are:

1. Whether the Secretary of War, in undertaking the acquisition of the Weldon Spring lands, including land of petitioners, by purchase, derived his authority from the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171), or from the provisions of Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), or from both of said acts.

2. Whether, if the Secretary of War derived his authority to acquire said lands, wholly or partly from Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), his determination through his duly constituted agent, Col. R. D. Valliant, of the Quartermaster Corps, after seeking and being given a legal opinion in the War Department to the effect that the cost-plus-a-percentage-of-the-cost prohibition of the said Public Act No. 703, applied to construction

contracts and not to contracts for the purchase of land (R. 287-288) to use the plan of acquisition used in contracting with these petitioners amounted to such an exercise of an administrative discretion vested in him by law as set forth in said Public Act No. 703, to determine whether or not the use of the contract contemplated under this plan of acquisition was a violation of the cost-plus-a-percentage-of-the-cost prohibition in said Act as is not subject to judicial review and is therefore conclusive.

3. Whether, if the determination mentioned in the last above question did not amount to such an exercise of administrative discretion as is not subject to judicial review, the Andrews land sale contract with the United States in the instant case is a contract entered into by the Secretary of War under the cost-plus-a-percentage-of-the-cost system of contracting and therefore in violation of the prohibition imposed upon him by Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), prohibiting him from entering into contracts under that system and therefore void.

4. Whether the Circuit Court of Appeals was precluded both by the finding of the District Court and by the uncontroverted evidence to the contrary in the record (R. 549-550) from finding that petitioners' option price included the amount that petitioners asked for the land plus McDowell's fee of 5 per cent of the sale price (R. 699-700).

5. Whether the Government is estopped to deny the validity of the contract.

6. Whether the Government ratified the contract.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals, by holding the contract to be invalid on the theory that it was prohibited by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, 54 Stat. 712, having so held notwithstanding the showing in the record that that question of law was considered and decided in the Department before entrance into the contract (R. 287-288), undertook to pass on such a discretionary act of an official of the War Department as is **not subject to judicial review**, and in doing so has **so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision** within the meaning of subdivision (b) of Section 5 of Rule 38 of this Court.

2. The decision of the Circuit Court of Appeals not only unduly broadens the scope of the prohibition in the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), prohibiting the Secretary of War from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, but limits the express authorization to the Secretary of War to enter into contracts following the cost-plus-a-fixed-fee form of contracting, by holding in substance that while the instant contract is a cost-plus-a-fixed-fee form of contract, specifically authorized by the statute in question, it is, nevertheless, to be considered a cost-plus-a-percentage-of-the-cost contract, because, according to the Court's finding, it would lead to the same evil which Congress sought to eliminate by the cost-plus-a-percentage-of-the-cost prohibition and that such intention of Congress cannot be allowed to be defeated by a mere decoration in form (R. 701). This doctrine of the Court of Appeals, if not repudiated by the Supreme Court, will seriously limit the War Department in its use of the cost-plus-a-fixed-fee form of contract and

is, therefore, a matter of tremendous public importance and it certainly presents one or both of two highly important questions of federal law, being:

(A) Whether the determination by the Secretary of War through his agent, Col. R. D. Valliant, after obtaining a legal opinion in the War Department, that the instant contract did not violate the cost-plus-a-percentage-of-the-cost prohibition of said act upon the theory that said prohibition applied only to construction contracts and not to real estate purchases (R. 287-288) is subject to judicial review, and

(B) Whether, if that determination is subject to judicial review, the contract here involved is under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of said prohibition and therefore void. The Controller General of the United States in his opinion, dated December 28, 1943, designated as B-38-322, decided that a contract involved, which followed the form of a cost-plus-a-percentage-of-the-cost contract, but which fixed a ceiling price of $6,000.00, beyond which the Government could not be liable, which ceiling price this contracting officer considered reasonable, was by reason of said ceiling price not within the scope of the prohibition of the Act of July 2, 1940 (54 Stat. 712), because the evils sought to be avoided by Congress in enacting said prohibition were avoided by the fixing of said ceiling price. The price fixed in the instant option contract is, of course, a definite price fixed at the time of entering into the contract by the Government beyond which the Government could have no further liability. Further, the Judge Advocate General, by his opinion S P J G C 1943 9887, rendered on July 8, 1943, has held that the mere fact that a fixed fee in a cost-plus-a-fixed-fee contract is arrived at by computing a percentage of the estimated cost does not make the contract a cost-plus-a-percentage-of-the-cost contract, and in support of this

proposition he points out that all fixed fees in fixed fee contracts must be arrived at by computing a percentage of the estimated cost for the reason that executive order No. 9001 provides that no fixed fee in a fixed fee contract shall be for a sum in excess of 7 per cent of the estimated cost. The fixed fee of McDowell in the instant contract was arrived at by computing a percentage of a definite price which is even more certain than computing a percentage of an estimated cost, and therefore even less apt to be considered objectionable. It is evident that both the Controller General and the Judge Advocate General believe that the evil legislated against by Congress in its cost-plus-a-percentage-of-the-cost prohibition was the incentive created by a compensation based on a percentage of an **undetermined cost**, and that that evil is eliminated by the fixed fee system.

3. The decision of the Court of Appeals construing an act of Congress known as Public Act No. 703, enacted on July 2, 1940, places an erroneous construction upon said act and thereby deprives these petitioners of their rights under Section 171, U. S. C. A. 50, under which the Secretary of War had a right to use his discretion in accepting an option for lands at a price which he deemed to be reasonable, said right having been exercised by said Secretary of War through its proper agent, and thereby having given to these petitioners a substantial right under the laws of the United States which was denied to them by said decision of the Court of Appeals.

Public Act No. 703 has no application to the contract involved in the Andrews case, because said contract did not contain the elements necessary to bring it within the class of contract known as cost-plus-a-percentage-of-cost contracts, because:

(A) The inhibition in said Act of July 2, 1940, was not intended to apply to contracts for the purchase of real

estate. The War Department, through its legal advisor, held that said act did not apply to purchases of real estate. [See testimony of Col. Valliant (R. 287).]

(B) There was no element of uncertainty or contingency involved in the commission to be paid the Government's agent, McDowell. That was definitely fixed when the option contract was accepted by Col. Valliant. The purpose of the provision in the Act of July 2, 1940, was to prevent frauds upon the Government, such as had frequently been perpetrated when the amount of the cost of a building or project was **not known in advance** and the commission to be paid the contractor could not, therefore, be determined in advance, and thus opportunities for stuffing pay rolls and increasing the cost of materials were seized upon by unscrupulous contractors.

4. There is a direct conflict between the opinions of two Circuit Courts of Appeals on an important question of law. The Circuit Court of Appeals for the Eighth Circuit in the case at bar held that the land purchase contract here involved is invalid because in the opinion of the Court it is a contract under the cost-plus-a-percentage-of-the-cost system of contracting within the prohibition of Section 1 of the National Defense Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171) (R. 691-703), whereas the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in U. S. v. Grace Evangelical Church, 132 Fed. (2d) 460, held that a contract identical with the one here involved except as to dates, names, description and price and accepted by Col. Valliant, as was the one here involved, to be valid, the said court having so held notwithstanding the fact that the question as to whether the contract there involved was a contract under the cost-plus-a-percentage-of-the-cost system of contracting within the meaning of said prohibition of said act and hence invalid, was before the Court as is shown

both by the opinion of Judge Evans in the Grace Church case and the Government's brief filed therein. That the system of contracting used in the Grace Church case was identical with that used in the instant case is shown both by the description thereof in the opinion of the Court in the Grace Church case and by the testimony of Mr. Robert H. Fabian, witness for the Government in this proceeding with reference to the commission of Mr. Raymond D. Herman (R. 312), the land agent mentioned in the opinions of the Court in the Grace Church case.

5. The questions here presented are of very great public importance—so great as to justify the settling of the same by this Court, for the following reasons, to wit:

(a) Col. Valliant's testimony (R. 278) shows that he had 107 projects of similar character in charge and that they were widely scattered. In many instances he had made purchases on precisely the same basis as that involved in this case, and the money had been paid to the landowners by the Government.

(b) In negotiating for lands for the project in St. Charles County, Missouri, on which a TNT plant was to be erected, approximately 270 contracts were made and it appeared from the evidence that purchases had been made on the basis of those contracts with approximately 129 landowners (R. 282), and paid for. Large sums of money were thus paid out by the Government.

(c) A large number of cases in which similar contracts were made are now pending in the District Court where the case in question was tried. A great amount of money is involved in these unsettled claims.

(d) The Government, if the decision in this case by the Court of Appeals is allowed to stand, may feel that it is its duty to institute suits to recover back large sums of money from many landowners with whom settlements

were made on the basis of such contracts. If the decision of the Court of Appeals is right, then the Government has unlawfully paid out enormous sums of money in many cases. If the decision is wrong, then it deprives these landowners of money to which they are justly entitled.

Contracts of a similar character having been made in various states, the question of the validity of such contracts is likely to come before various other courts of appeals for decision. Not only the district courts in other circuits, but other circuit courts of appeals as well will, if the decision in this case is allowed to stand, find themselves confronted with conflicting decisions from the Seventh and Eighth Circuit Courts of Appeals, and if this writ is not granted and the matter is not settled by this Court such a state of affairs will lead inevitably to much confusion on the part of the bench and the bar in the United States courts.

6. Under the evidence revealed by the record the Government is estopped to deny the validity of the contract.

7. The Government ratified the contract.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that the said opinion and judgment of said Court of Appeals in the case of United States of America, Appellant, versus William M. Andrews and Bertha L. Andrews, Appellees, No. 12,562, in said court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed, and the petitioners have such other relief as to this Court may seem appropriate.

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WEBSTER F. KARRENBROCK,
REDICK O'BRYAN,
Attorneys for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the said Court of Appeals in the above-mentioned case, which petitioners here seek to have reviewed, has not been reported, but appears on pages 690-703 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for writ of certiorari, and, in the interest of brevity, they are not repeated here. Reference will be made to such facts where necessary in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Circuit Court of Appeals erred in undertaking to decide whether the contract of petitioners with the United States fell within the class of contracts prohibited by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), that question having been decided by the Secretary of War through his duly constituted agent, Col. R. D. Valliant, after obtaining a legal opinion of the War Department on the subject (R. 288), and the decision of that question having been the exercise of an administrative discretion vested in him by law, which, since he acted in good faith, as found by the Court of Appeals (R. 693, footnote No. 5 of the opinion), is not subject to judicial review.

II.

The Circuit Court of Appeals erred in holding that the option contract of the petitioners with the Government was entered into by the Secretary of War in violation of the prohibition directed to the Secretary of War in the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), because of the use of the cost-plus-a-percentage-of-the-cost system of contracting, and, therefore, invalid because said contract lacked the essentials of a contract under said system of contracting.

III.

The Court of Appeals erred in holding that the method of contracting used in the case at bar gives rise to the evils sought to be prevented by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), and, therefore, falls within the scope of said prohibition while at the same time making a finding of fact that the Quartermaster General's agent, Col. Valliant, acted in good faith for the reason that, if he did act in good faith, he did not omit to do anything necessary to protect his principal, the United States of America, and his power to reject the option was adequate protection for the Government against the payment of inflated values, and, furthermore, being in good faith, his discretionary acts are to be presumed to be right and not subject to judicial review.

IV.

The Court of Appeals erred in finding that William M. Andrews and Bertha L. Andrews arrived at the gross sales price in their option contract by figuring the net wanted price and adding McDowell's 5 per cent commission thereto (R. 700) in the face of the uncontroverted evidence embodied in the testimony of William M. Andrews to the effect that they fixed their first figure of $150.00 per acre,

which was rejected, on the basis of replacement value (R. 549), and then, after further negotiation, came down to a lower figure (R. 550).

V.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

VI.

The Court of Appeals erred in not holding that the Government ratified said contract and is bound thereby.

SUMMARY OF THE ARGUMENT.

I.

The act of the Secretary of War through his duly constituted agent, Col. R. D. Valliant, in entering into the instant contract after considering whether it violated the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940 (54 Stat. 712), and obtaining a legal opinion on that subject in the War Department to the effect that said prohibition applied to construction contracts and not to real estate purchases (R. 288) was a discretionary act of an administrative officer not subject to judicial review. The aforesaid act had vested a broad discretion in the Secretary of War and pertained to the business of the War Department alone and was therefore, in so far as it directed the actions of officials of the War Department, to be construed by the War Department alone unless the War Department acted in bad faith in construing it, in which event only the act becomes subject to construction by the Judicial Department of the Government. Both the District Court and the Circuit Court of Appeals have made a finding to the effect that there is no question as to the good faith of the Department involved here.

Perkins v. Lukens Steel Co., 310 U. S. 113;
United States v. Speed, 8 Wall. 77;
Comptroller General's Opinion, 20 Compt. Gen. 890;
U. S. ex rel. Dunlap v. Black, Commissioner of Pensions, 128 U. S. 40.

II.

The contract involved here is not a contract under the cost-plus-a-percentage-of-the-cost system of contracting prohibited by the Act of July 2, 1940 (54 Stat. 712), and is not a cost-plus contract of any kind for the following reasons:

(A) At the time of the entering into the contract by the Government the total price of the land was fixed and not undetermined, whereas in a cost-plus contract the cost is undetermined at the time of entrance into the contract.

(B) There was no provision in the contract whereby the land agent, McDowell, was to be reimbursed for his costs in negotiating, whereas a cost-plus contract provides that the contractor shall be reimbursed for his costs.

(C) The contract is a fixed-fee contract because it was known when the contractual obligation arose that McDowell's fee was $600.00, or 5 per cent of $12,000.00. It was, however, not a cost-plus contract, but if it should be held to be a cost-plus contract, it would then be a cost-plus-a-fixed-fee contract, specifically authorized by the statute.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;
Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38,322, dated December 8, 1943;
United States v. Grace Evangelical Church, 132 Fed. (2d) 460.

III.

If the Quartermaster General acted in good faith, as was found by both the District Court and the Circuit Court of Appeals (R. 693, Footnote 5 of the Court's opinion), the method of contracting used by him did not bring about the evils sought to be avoided by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, as held

by the Circuit Court of Appeals, for the reason that he reserved the right to reject any or all of the options submitted, thereby avoiding any liability of the Government, either to the landowners or McDowell, as to any option so rejected. This power to reject the options was adequate means in his hands for the protection of the Government, and if he acted in good faith, as found by the courts, he did not and would not fail to use it in any instance in which it should be used. The evils which Congress had in mind in the aforesaid prohibition, such as inflated costs, could not therefore be here present.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;
Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported but designated B-38,322, Dated December 8, 1943;
United States v. Grace Evangelical Church, 132 Fed. (2d) 460.

IV.

The finding of the Circuit Court of Appeals that petitioners fixed their net wanted price and added McDowell's 5 per cent commission thereto and thus arrived at the gross sales price stated in the contract is contrary to the uncontroverted evidence.

V.

The principle of estoppel is applicable against the Government as to the contract of these petitioners, the Govern-

ment having entered into the contract in its proprietary capacity as distinguished from its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Wright, 78 U. S. 648;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

VI.

The United States, with full knowledge of all the facts pertaining to the entrance into the contract and full knowledge of the terms and provisions thereof, and after having entered into possession under and by virtue thereof, retained said possession for a period of time long before the declaration of taking was filed in this proceeding and thereby ratified the contract.

North American Transportation & Traction Co. v. United States, 253 U. S. 330;
Ford v. United States, 17 Court of Claims Report 60;
Moran Brothers v. United States, 39 Court of Claims Reports 486.

ARGUMENT.

I.

The Act of July 2, 1917, Title 50, Sec. 171, provided, in substance, that the Secretary of War might acquire lands needed for sites for plants for the manufacture of explosives either by condemnation or by purchase at a price fixed by the landowner reasonable in the opinion of the Secretary of War. This vested in the Secretary a discretion either to acquire such land by condemnation or by purchase. It further vested in him a discretion to determine whether or not a price in a landowner's offer is reasonable, and if reasonable to purchase same at that price.

While that act required that the Secretary purchase only at a price reasonable in his opinion, it placed no limitation whatever on the landowner in fixing his price. This left the landowner free to fix his price at any figure that he desired and the elements that he may consider in fixing his price are not material in such a transaction.

It is contended by the Government, however, and held by the Circuit Court of Appeals in this proceeding that the contract entered into is a type of contract forbidden by a provision of the Act of July 2, 1940, 54 Stat. 712, Title 50, App. Sec. 1171, and that the Secretary of War being prohibited from entering into the contract by that act, the contract is void.

The last-cited act is an act giving the Secretary of War many powers to do various things and removing certain statutory restrictions on his power. It also vests great discretion in the Secretary of War. It pertains solely to the War Department's business.

After these powers are given to the Secretary the following provision is made:

> "Provided further that the cost-plus-a-percentage-of-the-cost system of contracting shall not be used

under this section; but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The prohibition of the use of the cost-plus-a-percentage-of-the-cost system of contracting above quoted is the provision of said act which the Circuit Court of Appeals says is violated by the contract in question here. This contract was in the form of an option prepared by the War Department, whereby the landowner, for a consideration of $1.00, agrees that he will sell his land to the United States of America for a stated price, give immediate possession of the land to the Government upon acceptance of the option, and upon payment of the purchase price pay the Government's agent, McDowell, who solicited the option on behalf of the Government, a commission of 5 per cent of the gross sales price (R. 492-495). The option involved in the Andrews transaction was accepted by the contracting officer in the Quartermaster General's office on behalf of the Government (R. 495).

The Circuit Court of Appeals holds that this contract entered into by the War Department was in violation of the above-quoted provision of 54 Stat. 712, prohibiting the War Department from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, and is therefore invalid.

We submit, however, that 54 Stat. 712 vested in the Secretary of War the discretion to determine whether or not any contract which he contemplated entering into violated the foregoing prohibition, for if he did not have that discretion he could not contract at all, for the question as to whether any given contract which he contemplated entering into violated said prohibition would remain undetermined unless he could determine it. Such a condition would be contrary to the general tenor of the act, the general

purpose of which was to enlarge his power and discretion in view of the emergency.

We further submit that the testimony by Col. Valliant, the contracting officer (R. 288), to the effect that the question had come to their attention, and that an opinion was given him that said prohibition applied to construction contracts and not to land purchases, together with the fact that he subsequently accepted the option of these petitioners and many others, together with the telegram of Secretary of War himself to the landowners committee (R. 52-53), conclusively shows that that discretion was exercised. And we further submit that in view of the fact that the contracting officer acted in good faith as held by both the District Court and the Circuit Court of Appeals (R. 693, footnote 5, of Court's opinion), his exercise of that discretion was the exercise of such an administrative discretion as is not subject to judicial review, and that the Court of Appeals was precluded from holding that the contract so entered into violated the aforesaid prohibition of said act.

In support of our proposition that the foregoing was such an exercise of administrative discretion, we direct the attention of the Court to an opinion of the Comptroller General, reported in 20 Comp. Gen. 890, which, while it involves the construction of a different statute, substantiates the principle above set forth. A quotation from the Comptroller General's said opinion follows:

> "It is to be observed, too, that Section 2 of said Act excepts several classes of contracts from the provisions of the Act and **necessarily, in awarding contracts, a certain amount of discretion must be exercised in the way of determining whether a particular contract falls within the exceptions. It has been held that where a discretion of this kind has been conferred upon an officer and a contract is made in which that discretion has been exercised that the validity of the contract cannot be made to depend** on the degree of

wisdom or skill which may have accompanied its exercise. U. S. v. Speed, 8 Wall. 77. The record contains nothing to indicate that the omission of the requirements of the eight-hour law from the subject contract was merely an oversight or was for the purpose of contravening the law; and in the absence of such a showing it is to be presumed that the contracting officer was acting in accordance with law and considered, in the necessary exercise of his discretion, that the contract fell within one of the classes of exceptions and was not subject to the provisions of the law."

The highest authority on the question, however, is a decision of this Court, decided on April 29, 1940, the opinion having been written by Mr. Justice Black and the case being Perkins v. Lukens Steel Company, 310 U. S. 113. In this case the construction of an Act of Congress by the Secretary of Labor was in issue. It was claimed that the Secretary erroneously construed the term "locality." The following is an excerpt from the opinion of the Court written by Mr. Justice Black:

"Courts have never **reviewed** or **supervised the administration** of such an executive responsibility, **even where executive duties require the interpretation of the law. Judicial restraint of those who administer the government's purchasing** would constitute a break with settled judicial practice, and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the **administration of another branch of the Government.** * * * We find nothing in the Act indicating any intention to abandon a principle acted upon since the nation's founding under which the **legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases.** The committee hearings and reports and the construction of the measure by its sponsors disclose no purpose to **invoke judicial supremacy over agents chosen by Congress to perform these duties.**"

We submit that it was the duty of the Secretary to acquire real estate in a time of great national emergency for a site for a munitions plant. Vast discretion had been conferred upon him by laws of Congress. He had the discretion to acquire by purchase. While he was subject to the directions and restrictions imposed upon him by Congress, we submit that under the doctrine of the above-cited cases it was his function and not the function of the judiciary to construe those directions and restrictions. In this connection we also cite U. S. ex rel. Dunlap v. Black, Commissioner of Pensions, 128 U. S. 40.

We further submit that the act of the Circuit Court of Appeals in reviewing said discretionary act of the Secretary of War and in determining that the Secretary of War violated the law as set forth in the aforesaid Act of Congress "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision" within the meaning of subdivision (b) of Section 5 of Rule 38 of this Court.

II and III.

We submit that the contract between petitioners and the Government was not under the cost-plus-a-percentage-of-the-cost system of contracting. At the time of the passage of the Act of July 2, 1940, 54 Stat. 712, the terms "cost-plus-a-percentage-of-the-cost" and "cost-plus-a-fixed-fee" both had a definitely established meaning known to Congress and known to the War Department and public contractors generally largely as a result of the first World War.

The essence of the cost-plus-a-percentage-of-the-cost system was that the Government commits itself in advance by binding obligation to pay **an amount not specified in the contract** which amount is to be ascertained **in the future** by **computation of the total cost**, and at the time

of entrance into such a contract the Government also commits itself to pay in addition thereto a percentage of said **then unknown amount** as compensation to the contractor.

In the contract between the Government and these petitioners the Government did not bind itself to pay an unknown cost, but bound itself to pay $12,000.00 for the Andrews' land. There was no provision in the contract whereby the price could exceed that amount. There was no plus item payable to these petitioners; on the contrary, there were some minus items for them to consider. Petitioners had agreed in the contract to pay the Government's agent McDowell out of this $12,000.00 a commission of 5 per cent thereof, or $600.00, and to pay the other expenses of the sale, and this amounted to an agreement to pay the Government's obligation to McDowell under its contract with him which provided that the 5 per cent commission payable to McDowell by the vendor on the gross sale price was to be the **sole** compensation for the **services rendered thereunder.** (232 Govt. Exhibit M-5.)

We submit that this was not a cost-plus contract at all, but that it was a fixed-fee contract because the compensation to McDowell was fixed at 5 per cent of the gross sales price, which amounted to $600.00, said sum to be paid out of that gross sales price and not to be an additional $600.00 over and above the gross sales price. The contracting officer knew at the time that he bound the Government, that McDowell's commission was $600.00, and that it could not exceed that amount. Furthermore, since it was a fixed fee contract we submit that even if it should be construed to be a cost-plus contract, which construction we contend would be erroneous, it would then fall into the category of a cost-plus-a-fixed-fee form of contract specifically authorized by the Act of Congress, which act says,

> "but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract

> when such use is deemed necessary by the Secretary of War,"

and would therefore be legal and valid because specifically authorized by the act.

In this connection we think it pertinent to refer to an opinion rendered by the Judge Advocate General on July 8, 1943, SPJGC 1943/9887, to the effect that the mere fact that the fee in a cost-plus-a-fixed-fee contract is determined by a stipulated percentage of the estimated cost which may later prove to be greater or less than the actual cost of the work is not objectionable and does not render the contract in violation of the cost-plus-a-percentage-of-the-cost prohibition. The opinion further comments that as a matter of fact the percentage method is the only method that can be used in fixing such a fee because of the following quoted provision in Executive Order No. 9001:

> "In the absence of such limitation, the fixed fee to be paid the contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this order shall not exceed seven per centum of the estimated cost of the contract."

It is obvious that in order to determine whether the seven per cent limitation of the fixed fee, demanded by the executive order, is being complied with, the contracting officer would have to use a percentage method of fixing the fee in any cost-plus-a-fixed-fee contract.

The above cited opinion of the Judge Advocate General is digested in the Bulletin of The Judge Advocate General of The Army, July, 1943. This Bulletin is compiled by the Judge Advocate General as a Government Bulletin and, according to a letter of Gen. G. C. Marshall, Chief of Staff, appearing as a preface, is published for the information and guidance of all concerned.

A quotation from said digest of said opinion in said Bulletin, appearing on page 278 thereof, is as follows:

> "A contract under which the fee is determined by a stipulated percentage of the estimated costs is a cost-plus-a-fixed-fee contract; this does not violate the prohibition against the cost-plus-a-percentage system of contracting because such fee is fixed **in advance of performance** and is **not subject to subsequent modification.**"

The fee of McDowell provided for in the contract of petitioners with the Government was fixed at the time of entrance into the contract by the Government and was not subject to subsequent modification.

Furthermore, in another opinion of the Judge Advocate General (SPJGC 2174, May 27, 1942), the cost-plus-a-percentage-of-the-cost system of contracting is defined. The following is a quotation from the opinion:

> "In general it may be stated that the designation **cost-plus-a-percentage-of-the-cost system** of contracting is intended to refer to that method of contracting whereby the compensation of the contractor is determined by a percentage of the costs of labor and material and the direct incidental expenses of the project; **which costs and expenses are paid by the Government.** Under such plan the compensation of the contractor is **greater proportionately as the cost of the project increases.** The system has been condemned because of the incentive to the contractor to **increase the cost to the Government.**"

It is obvious, of course, that the contract of these petitioners with the Government being to sell the land at a fixed price left no room for such incentive as is referred to in the last quoted opinion.

The Comptroller General, in an opinion rendered December 8, 1943, being B.38322, held a contract which actually

followed the cost-plus-a-percentage-of-the-cost form of contract up to a fixed ceiling price to be a cost-plus-a-fixed-fee form of contract and therefore valid because the ceiling price fixed by the contracting officer amounted to a fixing of the fee and held that in view of the contracting officer's discretionary decision that the $6,000.00 ceiling price was reasonable, no evil could result from the contract.

There has been a contention by the Government, which contention seems to have influenced the Court of Appeals, to the effect that the plan of acquisition used in bringing about the contract of petitioners with the Government had present in it an incentive to McDowell, the land optioner, to promote high prices in order that his 5 per cent commission would be greater and that that assumed proposition in some way or other renders the contract of petitioners a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

This theory, however, overlooks some important factors. It overlooks the fact that the contract between McDowell and the Government (Govt. Exhibit M-5, R. 231-233) provided that his sole compensation was to be a 5 per cent commission payable by the vendor while at the same time reserving the right to the Government to reject any or all options submitted. Under such a state of facts, if the contracting officer should have exercised his right to reject the options, McDowell's compensation would have been nothing. That being true, McDowell had an incentive to procure the options at such a figure as it was reasonable to believe would be approved. This is exactly what happened in the transaction involving these petitioners. They at first submitted an option in favor of the United States to McDowell's man Williams on the basis of $150.00 per acre, but McDowell sent Williams back to them and Williams procured the option here involved at the lower price of $12,000.00.

Furthermore, regardless of McDowell's incentive, whether

it was to lift the prices up or keep them down, he was a mere negotiator, and when the contract actually came into being by the acceptance of the option by the contracting officer, the incentive of McDowell could no longer operate as is not the case under the cost-plus-a-percentage-of-the-cost system, and the contracting officer immediately before the contract came into being had ample power to prevent any evil consequence to the Government from any incentive that might have actuated McDowell while the option was in the process of negotiation by simply rejecting the option. As Mr. Justice Murphy has aptly said in United States v. Bethlehem Shipbuilding Co., 315 U. S. 289, "the United States is armed with both an actual and potential arsenal of powers adequate to protect it in dealing with private persons," and we submit that it surrendered none of these powers in this transaction. The contracting officer not only had the power to protect the Government, but did so. He exercised his discretion and determined the price to be reasonable. Both the District Court and the Circuit Court of Appeals have found that there is no question as to his good faith, and if he acted in good faith the presumption of law is that he did everything that it was his duty to do. In Bank of The United States v. Dandridge, 12 Wharton U. S. 64, the opinion of the Court contained the following statement:

> "The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do or will omit to do aught which his official duty requires should be done."

We suggest that if the Government had contracted with McDowell to buy the land himself and had at the same time agreed to buy it from him at the price which he paid for it plus 5 per cent, that would have been a cost-plus contract; but such was not the arrangement. McDowell had no power to buy the land but was a mere negotiator and

the Government had specifically reserved the right to reject the negotiated options, in which event McDowell was to get no compensation. If, on the contrary, the option was accepted, McDowell would receive only a fixed percentage of the fixed price and he was not to be reimbursed for his expense in negotiating same.

We submit that it is highly significant that a contract containing provisions identical with the provisions of the contract under consideration in this case was held valid by the Court of Appeals of the Seventh Circuit in United States v. Grace Evangelical Church, 132 Fed. (2nd) 460. That the question as to whether the contract involved in that case was in violation of the aforesaid prohibition against the cost-plus-a-percentage-of-the-cost system of contracting was before the Court is shown by the dissenting opinion, although the majority of the Court apparently did not consider the point of sufficient merit to call for discussion in the opinion.

We submit further that the existence of the aforesaid decision of the Court of Appeals of the Seventh Circuit and the decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar creates a condition "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter" within the meaning of Subdivision (b) of Section 5 of Rule 38 of this Court.

IV

These petitioners did not arrive at their price of $12,000.00 by fixing their net wanted price and then adding McDowell's 5 per cent commission thereto as found by the Circuit Court of Appeals (R. 699-700) and contrary to the finding of the Court that there is no evidence in the record that they did not (R. 699), there is uncontroverted evidence that they did not do so, being the testimony of William M. Andrews to the effect that they considered

only replacement value in fixing the price named in the first option signed by them on the basis of $150.00 per acre, and that after negotiation they came down to the $12,000.00 price fixed in their accepted option, being on the basis of approximately $125.00 per acre (R. 549-550).

V.

The Government is estopped from denying the validity of the contracts by reason of the fact that in contracting with the petitioners herein it was acting in its proprietary capacity as distinguished from its sovereign capacity, and that when it acts in said proprietary capacity it is subject to the general rules of estoppel applicable to private persons and by reason of the further fact that long after it had obtained possession of the land under the contracts and after it had failed to do its part in the completion of the transaction, and for a long period before it had filed this proceeding, it retained the fruits of the contract, to wit, possession of the land.

VI.

In view of the fact that the Government went into possession of the land under the contract in December, 1940, and remained in possession until June 2, 1941, the date of the filing of the declaration of taking, it ratified the contract, and if the contract was, as a matter of fact, invalid, it would be validated by the aforesaid ratification.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

JAMES KARL MUSCHANY and VERA MUSCHANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 31.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF JAMES KARL MUSCHANY AND VERA MUSCHANY, PETITIONERS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

JAMES KARL MUSCHANY and VERA MUSCHANY, Petitioners,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 31.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF JAMES KARL MUSCHANY AND VERA MUSCHANY, PETITIONERS.

This case is here on writ of certiorari issued by this court on the 3rd day of April, 1944, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to review the opinion and judgment of said Court in the case of United States of America, Appellant, versus James Karl Muschany and Vera Muschany, Appellees, No. 12,561 in said court of appeals.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the above mentioned case, No. 12,561, which was consolidated with the case of William L. Andrews and Bertha L. Andrews, appellees, No. 12,562, for argument in said court, appears in the printed transcript filed herein on pages 691 to 703, inclusive, and is now printed in 139 Fed. (2) 661, and is entitled in both of said cases, though separate judgments were entered.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347, which provides in effect that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was originally entered on December 22, 1943 (R. 703). A motion for a rehearing was duly filed by petitioners who were appellees in said court on January 5, 1944, within the time provided by the rules of said Court (R. 721), and said motion for a rehearing was denied by said Court of Appeals on January 14, 1944 (R. 723), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the statutes of the United States, and particularly United States Code Annotated, Title 50,

Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 18), which right was denied by the decision and judgment of said Circuit Court of Appeals.

STATEMENT.

The suit above referred to was instituted by the United States of America against these petitioners to condemn land to be used by the War Department for the erection of an ordnance plant to manufacture TNT for the use of the armed forces of the United States (R. 4-10).

A declaration of taking was filed on the 7th day of April, 1941 (R. 4-12). Judgment of condemnation on the declaration of taking was entered on April 9, 1941 (R. 13-16). The taking included tract No. 24-233, consisting of 33.33 acres of land owned by the petitioners herein.

On the 17th day of May, 1941, these petitioners filed an answer to the petition in condemnation in which they alleged that prior to the institution of said suit the United States Government, through its duly authorized agent, had entered into a contract with these petitioners to purchase said land at the price of $4,500. The terms of the contract were set forth and the petitioners prayed the Court to dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price, pursuant to the terms of said contract (R. 18-20).

A reply to said answer was filed, followed by the filing of an amended reply and on April 3, 1942, by the filing of a second amended reply to the answer (R. 21-37), in which the Government alleged that the purchase contract was fraudulent because of certain alleged fraudulent representations; contrary to public policy and violative of a provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix, Sec. 1171, known as Public Act. No. 703.

On account of the large number of cases wherein the validity of the contracts was involved, and the importance

of said cases, the three District Judges sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet; and he made the rulings on the evidence offered and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 Acres of Land in St. Charles County, Mo., 45 Fed. Sup., p. 1016.) The other two Judges went to their respective court rooms after the trial of the first case, and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases, and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of the statute of the United States known as the Act of July 2, 1940 (Public Act No. 703), above cited, prohibiting the making of contracts by the Government on the basis of cost-plus-a-percentage-of-cost.

Judge Davis, in the Muschany case, decided that the said statute did not apply, as the contract in question was not of the character prohibited by said statute and did not violate that statute, and found that the contract was valid and binding and that there was no evidence tending to show that it was procured by fraud. Judge Davis filed a written opinion which is set forth in the record herein, pages 449-460. (For decree see R. 466-468.) See U. S. v. Certain Lands in St. Charles County, Mo., 46 Fed. Supp. 920.

Judge Moore held the contract in the Andrews case valid and adopted, as far as applicable, the opinion which had been rendered by Judge Davis in the Muschany case. Judge Moore's opinion is set forth in the record herein, pages 656-657. (For decree in that case, see R. 663-665.)

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land and that commissioners should be appointed to fix the value

of the land in question in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date. It is awaiting the outcome of this proceeding, as are many other cases.

Judge Davis held in the Muschany case that the landowners therein (petitioners herein) were entitled to have judgment entered on the contract for the sum fixed therein, to wit, $4,500, together with interest thereon, less amount deposited in court by the Government as the estimated value of the land, pursuant to the terms of the statute applicable in such cases (R. 468).

The judgment entered by Judge Moore in his division of the court in the Andrews case was to the same effect as that entered by Judge Davis in the Muschany case (R. 665).

Separate appeals were taken by the Government in both of said cases, after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Muschany case and at the trial of the Andrews case that the evidence offered in the trial of the Callaway case should be considered in evidence as far as applicable in the trial of said two last mentioned cases; and therefore the parties entered into a stipulation (R. 3) which was filed in the Court of Appeals, agreeing that a joint transcript of the record might be prepared and filed and used in that court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686).

After the taking of all proper proceedings pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689); and on the 22nd day of December, 1943, said Court handed down an opinion entitled in both of

said cases, though a separate judgment of reversal was entered by that Court in each of said cases, as above stated (R. 703-704).

We deem it appropriate to refer a little more in detail to the evidence offered in the District Court. That offered in chief by the Government shows clearly that all proper proceedings had been taken by the Government to authorize the District Attorney to institute and prosecute proceedings for the condemnation of said lands and institution of the suits (R. 42-44).

Evidence offered by petitioners herein showed that prior to the institution of the suits for condemnation, and at the direction of the Quartermaster General, Lieutenant-Colonel R. D. Valliant of the Quartermaster Corps, in charge of the real estate branch of that department (R. 50), undertook the work of negotiating for the purchase of lands in said area, and was properly designated to make contracts for such purchases, the War Department being authorized to acquire lands for such purposes as that involved here, either by purchase at such price as in the opinion of the Secretary of War was reasonable, or by condemnation (U. S. C. A. Tit. 50, Sec. 171).

The area involved was a very large one, embracing approximately 18,000 acres of land in St. Charles County, Missouri, something like 30 miles west of the City of St. Louis.

A man by the name of R. Newton McDowell came into the area in October or November, 1940, and began negotiating with landowners for option contracts on their respective lands in said area. Learning of the project, the landowners chose a committee to look after their interests. That committee telegraphed the Secretary of War at Washington, D. C., inquiring as to who was authorized to represent the Government in negotiating for the purchase of such lands, the landowners not being sure of the author-

ity of McDowell. In reply to that telegram, the Secretary of War, on November 9, 1940, sent the following telegram to the chairman of said committee:

"Nov 9 110P

E R Sutton Citizens Committee
St Charles Mo

Reurtel Oct Twenty Eight Weldon Springs Mo. Area Has been Approved by War Dept for Munitions Plant Site Stop Property Will Be Purchased by Mister R. Newton McDowell and Agents Representing Office of the QM General Stop Mr. McDowells Organization Directly Represents the Government

Stimson, Secy of War,
Wash DC" (R. 52-53)

Being thus assured of McDowell's authority to represent the Government, these petitioners and many other landowners entered into negotiations with McDowell and as the result of such negotiations the contract here involved was furnished to the petitioners by McDowell, was filled in by him and then signed by petitioners and turned over to McDowell for him to forward to the War Department. The price agreed upon as the purchase price in the contract was $4,500.

In securing the option contract in question in this case, as in all other cases, printed blanks which had been prepared by an attorney for the War Department and furnished to McDowell were used by him (R. 308). All of them were on printed forms precisely alike, merely leaving spaces for the date, the description of the land in question, the price agreed upon and the signatures of the owners. The Muschany contract is set forth in full on pages 342-344 inclusive of the record.

The offer set out in the option contract, in a lump sum, the price to be paid by the Government, and provided that

out of it the owner should pay McDowell 5 per cent and all expenses of clearing the title (Rec. 342-344). It contained no provision whereby, after the Government accepted the offer, the amount to be paid by the Government or to be received by the owner or anyone else could be in any wise increasd above the sum specified in the offer. When the Government accepted the offer the total cost was fully known and finally established.

The provision of the contract which gives rise to the question decided by the Court of Appeals was to the effect that 5 per cent of the purchase price fixed in said contract should be paid by the landowner to McDowell to cover his commission for services. No evidence in the record shows that the price of the Muschany land was agreed on, and that 5 per cent was added to make up the $4,500.00.

The contracts were designated as option contracts. McDowell had no authority to sign any of them, nor did he do so. He forwarded them to the office of the Secretary of War with his recommendation. The Quartermaster General had in his department experts who passed upon the contracts with relation to the prices and other features and then passed the contracts on to Col. Valliant, who was a man of vast experience in such matters, having charge of 108 projects of similar character for the Government, totalling about $50,000,000.00. He had seven experts on such matters. When a contract was referred to one of them his instructions were to examine it and all papers with it and if it appeared satisfactory to approve it and pass it on to Col. Valliant. If the contract looked all right to him he signed an acceptance of it (R. 278), and one copy was then retained by him and one copy came back to the landowner, who then made a deed to his property and turned it over to the title company for approval. Immediate possession of the lands was given by the owners upon learning of the acceptance of their contracts by the Government (R. 342).

A large number of such contracts had been signed and many of the deeds had been passed and some of them had actually been recorded in the office of the Recorder of Deeds for St. Charles County, Missouri, and in a great many instances the contract prices had been paid to the landowners before the Government decided to deny the validity of any of the contracts. But when the Government had reached the conclusion that it would contest the contracts on February 7, 1941, it stopped payment on all other contracts for which the consideration had not yet been paid, including the one involved in this case (R. 82).

On the part of the Government evidence in rebuttal by men who claimed to be experts on land values was offered (though most of them resided far from the lands in question), and their estimates of the value of the Muschany land varied all the way from $1,250.00 to $2,500.00—an average of $1,972.00.

On the part of the petitioners, evidence was offered from witnesses, most of whom lived in the immediate vicinity of the lands, some of which showed the fair reasonable market value of the land in question to be $5,000.00, while some other estimates were for lesser figures, the lowest being $3,500.00—an average of $4,546.00 (see Judge Davis' memorandum, R. 451).

After all proper steps were taken by the Government this case was taken to the Court of Appeals.

In that Court the judgment of the District Court was reversed on the theory that the contract in each case was one for cost-plus-a-percentage-of-cost, and therefore void under the federal statute above cited (see opinion of Court of Appeals, R. 690 to 703, now reported in 139 Fed. Rep. [2] 661), and the cause was remanded to the District Court with directions to proceed with the case as a condemnation suit, appointing commissioners, etc.

The Court of Appeals expressly exonerated from any charge of default or bad faith the Quartermaster Depart-

ment to which the Secretary of War had delegated the performance of his duties in the purchase of the land.

Thereafter, on the 14th day of January, 1944, the petitioners' petition for a rehearing of said cause, which had been filed in due time pursuant to the rules of the Court of Appeals (R. 705-721), was overruled by said Court and its judgment thereby became final (R. 723).

An application to withhold the mandate of the Court for thirty days in order to permit these petitioners to apply to this Court for a writ of certiorari was sustained by the Court of Appeals by order entered on January 27, 1944 (R. 740).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Court of Appeals was filed herein, together with the requisite number of copies thereof, in compliance with the rules of this Court.

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Court of Appeals erred in holding that the option contract between the Government and the Muschanys is of the class known as cost-plus-a-percentage-of-cost contracts, because its provisions clearly distinguish it from such contract.

II.

The Court of Appeals erred in holding that the provisions of Public Act No. 703, relating to contracts based on cost-plus-a-percentage-of-cost, rendered said option contract invalid.

III.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

IV.

The Court of Appeals erred in not holding that the Government ratified said option contract and is bound thereby.

V.

The Court of Appeals erred in not holding that by exercising the authority to enter into said contract, such authority being expressly given by law to the Secretary of War who acted through his proper agent, the said Secretary of War did an administrative act which cannot be inquired into by the courts in the absence of fraud.

VI.

The Court of Appeals erred in holding in effect that Public Act No. 703, being part of a mere appropriation act, limited the powers given to the Secretary of War by an act that had been on the statute books since 1917 (approximately twenty-three years), to wit: "Sec. 171, U. S. C. A., Tit. 50,", and in giving the provisions of said Public Act No. 703 a very broad and liberal construction instead of giving the same a very strict construction.

SUMMARY OF THE ARGUMENT.

I.

The provisions of the option contract in question clearly distinguish it from a contract made on the basis of cost-plus-a-percentage-of-cost. All of the important elements necessary to make a contract of that character are absent from the contract in question, notably all language tending to create any uncertainty whatever in the exact amount finally to be paid by the Government. All of the evils which were present under the old system of contract whereby contractors were employed to do construction work, the amount of which was unknown in advance and commissions on which would consequently be unknown in advance and on account of which Public Act No. 703 was passed, are entirely absent from the contract here involved.

II.

The option contract was not prohibited by the provisions of Public Act No. 703, and, therefore, was not violative thereof.

III.

All defenses which are available against an individual, including the defense of estoppel, are available against the Government in cases like this, wherein contracts are entered into by it in its proprietary capacity, not in its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. Nat'l Exchange Bank of Baltimore, 270 U. S. 527;
U. S. v. Bethlehem Steel Co., 315 U. S. 289, 62 Sup. Ct. Rep. 581;
U. S. v. Wright, 78 U. S. 648;
Bartlett v. Kane, 57 U. S. 263;

U. S. v. Arrendondo, 31 U. S. 691;
Belcher v. Linn, 65 U. S. 508;
U. S. v. Fuller, 14 Fed. (2d) 813;
England Bank v. U. S., 282 Fed. 121;
Pan-American Co. v. U. S., 273 U. S. 456;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673;
The Falcon, 19 Fed. (2d) 108;
State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver & R. G. W. Ry. Co., 16 Fed. (2d) 374.

The Secretary of War having authority under U. S. C. A., Tit. 50, Sec. 171, to enter into contracts for the purchase of land for such purposes as that involved in the TNT project, and having entered into such a contract, the Government is estopped to deny the validity of such contract which he made, for all the facts and circumstances as to the manner of making the contract were fully known to the War Department's agents and with such knowledge the Government took and held possession of the land.

IV.

By its acts, after having full knowledge of the contract and all the facts and circumstances connected with the making thereof, the Government ratified said contract and could not now rescind the same, even if the contract had been fraudulently conceived and if such fraud had brought about the execution thereof.

First Nat'l Bk. of K. C. v. Seldomridge, 271 Fed. 561;
City of Findlay v. Pertz, 66 Fed. 427;
Ebel v. Roller, 21 S. W. (2d) 214;
In re: Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
Michigan State Bank v. Hastings, 1 Douglass (Mich.) 225;
U. S. v. North American etc. Co., 253 U. S. 330, 40 S. Ct. 518, l. c. 520.

V.

The act of the War Department in entering into the option contract was an administrative act, the doing of which was delegated by law to that department, under the Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. A. 171, which gave the Secretary of War full power and authority to make purchases of real estate for munitions plants, accepting offers for the sale of real estate to the Government for such purposes when in the opinion of the Secretary of War the price was reasonable.

Many similar acts by heads of various departments of the Government have been held to be administrative acts with which the courts would not and should not interfere, unless the discretion of such department representatives was abused or they were guilty of fraud, of which there is no evidence in this case, as has been expressly held by all three of the district judges and by the Court of Appeals.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. Rep. 427, Secy. of War;
Barnidge v. U. S., 101 Fed. (2d) 295, Secy. Dept. of the Interior;
U. S. v. Threlkeld, 72 Fed. (2d) 464;
Shoemaker v. U. S., 147 U. S. 282, 13 S. Ct. Rep. 361, Commission of District of Columbia;
U. S. v. Wright, 78 U. S. 648, Postmaster General;
Bartlett v. Kane, 57 U. S. 263, Secy. of Treasury;
Belcher v. Linn, 65 U. S. 598, Secy. of Treasury;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14, Secy. of War;
Lee v. U. S., 61 App. D. C., 153, 58 Fed. (2d) 879, Secy. of Treasury.

VI.

The effect of the decision of the Court of Appeals is that the Act of July 2, 1940 (Public Act No. 703) repealed the essential provisions of the Act of July 2, 1917 (40 Stat.

241, 50 U. S. C. A. 171) to the extent of practically destroying certain of the powers vested in the Secretary of War by the last-mentioned act, which had been on the statute books for approximately twenty years, while Public Act No. 703 was a mere incident to and part of an appropriation act, which, in so far as it had any tendency to repeal or limit the effects of the old general statute cited, should be most strictly construed, while the Court of Appeals in its opinion gave said Public Act No. 703 a very broad construction.

ARGUMENT.

I and II.

The Court of Appeals held that the contracts with the landowners violate the prohibition against the use of a "cost-plus-a-percentage-of-cost" system of contracting contained in Public Act No. 703.

A cost-plus-a-percentage-of-cost contract is a well-recognized form of contract. **It means just what its name implies.** In such a contract one party agrees to pay the other party his cost of producing the thing desired and also agrees to pay a percentage of such cost for the services rendered by the producing party. Such a contract requires the presence of the following essential elements:

(a) The contract provides for payment **by the first party** of a base consideration **to the second party.**

(b) The base consideration is the actual cost to the second party of performing the contract.

(c) **The base consideration is not fixed in amount at the time of the execution of the contract** and is not determined until the thing desired has been constructed or produced.

(d) The contract also provides for the payment by the first party of an additional consideration or fee to the second party in the form of a percentage of the base consideration.

(e) The fee is for the services of the second party in the performance of the contract **and is paid to him by the first party.**

(f) **The fee is not fixed in amount at the time of the execution of the contract,** nor can it then be computed, for it consists in a fraction of the base consideration, which itself is not then known.

Though this method of contracting is foreign to contracts for the purchase of land, let us see if the contracts in suit comply with the above requirements.

(a) The land contracts do not contain any condition for the payment of a base consideration by the Government to the landowner, but provide for the payment of a single sum, the agreed price of the land, which was definitely known and clearly stated in the contract. The Government undertook to circumvent this difficulty by penetrating the face of the contracts by contending that since, in some instances, the landowner added McDowell's fee of 5 per cent to the net figure that the landowner demanded for his property, the Government in effect paid the landowner a base consideration in the net figure demanded by the landowner and, in addition, a fee to McDowell in the form of a percentage of the base consideration. It should be recalled that there was no proof that McDowell's commission was added to the landowner's net figure in any of the three cases tried. Whatever was done in other cases, of course, does not affect this case.

Upon acceptance of an offer from a landowner by the Government, it was obliged to pay such landowner the agreed price, and not obliged to pay McDowell anything. Suppose a judgment should be entered in the Muschany case in favor of the landowner for the amount of the contract—whom, then, could McDowell sue to recover his commission: the landowner or the Government? The answer, obviously, is the landowner, and the landowner only. Thus, whatever method was employed by the contracting parties in arriving at the agreed price, **as a matter of law the Government was obliged to pay only the landowner the agreed price for his land, and the landowner was obliged to pay McDowell.**

But even if each landowner had added McDowell's commission to his net figure, and even if the Government's

acceptance of the price offered had amounted to its paying McDowell's fees, this would not make the contracts of purchase cost-plus-a-percentage-of-cost contracts, because:

(b) The consideration to be paid by the purchaser on the land contracts in suit is not the actual cost to the other party of the thing desired, but is the sum for which the landowners offered to sell their land and which the Secretary of War deemed reasonable.

(c) The consideration to be paid for the land in the land contracts was fixed in amount at the time of the execution of the contracts. There was no uncertainty or contingency of any kind connected with it.

(d) and (e) The contracts do not provide for the payment by the first party of an additional consideration or fee to the second party. As has already been said, they provide for the payment of a single consideration or sum to the second party. The fee, in the form of a percentage of the consideration of the contract is to be paid by the landowners to a person not a party to the contract, to wit, McDowell. But whether McDowell's fee is paid by the landowners, as required by the contract, or is actually paid by the Government, as contended by the Government, the fee is not paid by one party to the contract to the other party thereto, but is paid to a third person.

(f) Since the contracts provide for the payment of an agreed sum by the purchaser, the fee based thereon is fixed in amount at the time of the execution of the contract. It is wholly different from a fee to be figured later on an amount then unknown.

The primary reason for the objection in Congress to the cost-plus-a-percentage-of-cost form of contract was that in such contracts the fee for services was not fixed in amount at the time of the execution of the contract and depended upon the cost of performing the contract incurred by the

contractor, a sum wholly unknown at the time, and which could easily be arrived at later by gross frauds in stuffing pay rolls and other costs of construction or manufacture.

The essential iniquity of the cost-plus-a-percentage-of-cost method of contracting is that there is no definite ascertainment of the extent of the Government's liability under such a contract at the time of the execution of the same. On the contrary, the Government merely agrees to pay the cost of performing the contract, and to pay, in addition, a percentage of that cost to the other party for his services in performing the same. It is obvious that it is in the interest of the latter party to increase his cost of performing, as his fee, based on that cost, will be proportionately larger. But the contracts in suit do not create this iniquitous situation. **The amount to be paid the landowner is definitely fixed at the time of the execution of the contract,** so the Government knows definitely what its liability is upon the contract from the time of the execution. Furthermore, if it be assumed, for the purpose of argument only, that under the contracts as performed the Government paid McDowell's fee, **this fee, too, was fixed in amount at the time of the execution of the contracts.** Therefore, the contracts with the landowners do not, either in law or in spirit, violate Public Act No. 703, because they are not cost-plus-a-percentage-of-cost contracts.

In holding that the option did not violate the prohibition against the cost-plus-a-percentage-of-cost provision of the Act of July 2, 1940, District Judge Davis, in his opinion (46 Fed. Supp., l. c. 926; R., l. c. 453-454), said:

> "The term cost-plus is generally used in connection with construction contracts and the legal staff of the War Department advised Colonel Valliant that the clause was limited to such agreements and did not apply to contracts for the acquisition of land. The term means that a party who provides facilities, what-

ever they may be, will be paid his cost therefor and in addition will be paid a percentage of that cost for his services. Both items are payable to the same party and by the same party. The amount of each payment is unknown at the time of the execution of the contract. It is the uncertain nature of both items, particularly of the plus payment, that gave rise to the opposition to cost-plus-a-percentage contracts. The option contract in this case required the Government to make, not two, but one payment and the amount of that payment was not unknown, but known and written into the contract at the time of its execution. If it be assumed that actually the Government was paying the commission, then the amount was not uncertain but was certain at the time the contract was approved. If the payment of the land owned is to be regarded as the cost element and the commission to the agent is to be regarded as the plus element, as is argued, then the option agreement is not a cost-plus-a-percentage contract but is in reality a fixed fee agreement, which is expressly authorized by the statute."

Finally, it is obvious that the cost-plus-a-percentage-of-cost method of contracting could not be employed in the acquisition of land alone. Col. Valliant testified that he had been advised by attorneys in his department that Public Act No. 703 applied only to construction contracts (R. 287). It is probable that he meant to include contracts for the production of war materials as well as construction contracts.

The construction that Public Act No. 703 is limited to production or construction contracts, and not to the acquisition of land, excepting only in the limited sense contained within the parenthesis in the act, is borne out by an examination of the purposes of the act. This congressional enactment was passed to expedite the preparation of the national defense by removing from the Secretary of War the necessity of complying with certain restrictions there-

tofore imposed upon him by other statutes. An examination of these restrictions imposed by other statutes upon the Secretary of War indicates that they apply only to construction or production contracts. For example, the restriction requiring the necessity of advertising before entering into contracts necessarily applies only to construction or production contracts. It could not apply to the acquisition of a specific piece of land by the Government, because only one person owns that land, and the element of competitive bidding guaranteed by advertisements and bids cannot be applied to such a situation. Furthermore, it is impossible for either the cost-plus-a-percentage-of-cost or the cost-plus-a-fixed-fee method of contracting to apply to a contract which is devoted solely to the acquisition of land by the Government under Section 171, Title 50, U. S. C. A., for the very obvious reason that land is not acquired under this section on the basis of its cost to the owner. On the contrary, it is acquired on the basis of the reasonable value of the land at the time of the execution of the contract, as determined by the Secretary of War.

Therefore, Public Act No. 703 does not apply to the acquisition of land only, as in the contracts in suit.

These contracts were prepared by the Government, through the legal advisors in the War Department (R. 308); **offers were secured from the landowners, and the contracts accepted under an arrangement set up by the Government.** The landowners neither prepared the contracts nor set up the organization for the acquisition of the land. While the offers were being secured, the Government had every opportunity to change its method of land acquisition. By the contract between the Government and McDowell the former had the right to scrutinize his deals by inspecting and taking copies of his records evidencing his transactions. The Government sent a Department of Justice agent out to St. Charles for two weeks in Novem-

ber (R. 247), who left satisfied. Apparently the Government also was satisfied with the arrangements set up by Col. Valliant's office, because they were not changed. The Government could have ceased purchasing altogether. It was not like a private buyer who had to induce the purchaser to sell, or fail to acquire the property. The Government could condemn the lands if it failed to secure acceptable offers, and it threatened the landowners with doing just that in McDowell's letter to them announcing the project. This peculiarly advantageous position of the Government was well described by Mr. Justice Murphy in his concurring opinion in United States v. Bethlehem Steel Corporation, supra, in which he referred to the Government as enjoying "* * * both an actual and potential arsenal of powers adequate to protect its interests in dealings with private persons." (See 62 S. Ct., l. c. 592, 315 U. S., l. c. 311.)

III.

The act of the Government in entering into the option contract was done in its **proprietary** capacity as distinguished from its **governmental or sovereign capacity.** Had the Government resorted to eminent domain proceedings in the first place to acquire the land in question, it would have done so in its sovereign capacity. But it saw fit to enter into contracts with the landowners for the purchase of the lands without suit, as authorized by statute, and in making such contracts it acted in its proprietary capacity. When the United States enters into a contract in such capacity it will be enforced against the United States just as a contract of similar character would be enforced against an individual person, and all defenses, equitable as well as legal, which would be available to such individual, including the doctrine of estoppel, may be invoked by the individual party to such contract, when an attempt

is made by the Government as plaintiff to have such contract declared invalid.

U. S. v. Nat'l Exchange Bk. of Baltimore, 270 U. S. 527, 46 S. Ct. 388;
Bartlett v. Kane, 57 U. S. 263, 14 L. Ed. 931;
U. S. v. Wright, 78 U. S. 648, 20 L. Ed. 188;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
U. S. v. Arrendondo, 31 U. S. 691, 8 L. Ed. 547;
Belcher v. Linn, 65 U. S. 508, 16 L. Ed. 754;
U. S. v. Geo. A. Fuller, 14 Fed. (2d) 813;
England Nat'l Bk. v. U. S., 282 Fed. 121;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

Upon the authority of the Dayton Airplane Company case and others referred to, Col. Valliant, as representative of the Secretary of War, had wide discretionary powers in the execution of the contract in question. Therefore, the doctrine of estoppel may be invoked against the Government in the enforcement of this contract, and, upon the authority of other cases, referred to under this heading, rules relating to the enforcement of contracts generally will be applied against the Government.

In the Dayton Airplane case, supra, it appeared that the Government had contracted with the airplane company for the production of planes. The Court said (21 Fed. [2d] 673, l. c. 674):

> "The Government was acting by the Secretary of War in a national emergency of the first class. His discretion was unlimited; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it. Rules of estoppel and fair dealing apply in full force as with individuals."

See, also:

State of Iowa v. Carr, 191 Fed. 257;
U. S. v. Denver and Rio Grande Western Ry. Co., 16 Fed. (2d) 374.

In the case at hand the Government submitted itself as plaintiff to the jurisdiction of the District Court for the Eastern Division of Missouri by commencing the eminent domain proceedings therein; and when the defendants (landowners) in this case filed their answer asserting the land contracts, the Government in its second amended reply resorted to the equity powers of the Court by asking for a rescission of the contract, alleging that it was induced by fraud and mistake. Clearly, then, these petitioners, as defendants, had the right to set up equitable defenses, including the defense of estoppel.

With full knowledge on the part of the War Department, through Col. Valliant, its agent, the War Department took possession of the land in question pursuant to the contract which its representative had signed, and continued to exercise exclusive possession and control of the same until April 7, 1941, without making any claim of fraud in the procuring or execution of the contract, and during that time paid many thousands of dollars to other landowners in the area under the terms of their contracts which had been procured precisely as the contract in question was, and which were in all essential respects duplicates thereof.

Petitioners had surrendered their land and had thus suffered loss, relying upon the contract which the Government had made with them, and it is only just and fair now that the Government should be held to be estopped from denying the validity of that contract.

IV.

Even if the Government had proved that the petitioners participated in a fraud upon the Government in procuring the option contract in question (which the Government wholly failed to do) it could not now rescind its contract because it has, with full knowledge of all the facts, ratified the same.

That the Government had such knowledge is clearly revealed by the record, especially by the testimony of Col. Valliant, to which various references have been made herein (R. pp. 276-308). The Government, through Col. Valliant, signed the written acceptance of the Muschany contract on the 3rd day of December, 1940. It then took immediate possession of the land and has held it ever since that time. It continued to hold possession of the land under said contract, with full knowledge as aforesaid, during all that time until April 7, 1941, before it instituted suit to condemn the land and filed its notice of taking.

The doctrine of ratification applies to a sovereign as well as a private individual, when invoked for the purpose of enforcing a contract entered into by the sovereign in its proprietary capacity.

Re Cuban-Atlantic Transport Corp., 57 Fed. (2d) 963;
City of Findlay v. Pertz, 66 Fed. 427;
U. S. v. North American etc. Co., 253 U. S. 330, 40 Sup. Ct. 518, l. c. 520.

If any party to a contract could ever be held to have ratified the same, the Government ratified the contract in question.

V.

The act of the Secretary of War in purchasing the petitioners' land by contract, instead of acquiring it by condemnation, was a discretionary act performed by an executive or administrative officer in charge of a department of the United States, and therefore the courts will not review or interfere with such act, absent proof of abuse of discretion or fraud, and there is no evidence in the Muschany case tending to show either abuse of discretion or fraud.

This rule has been applied to many different kinds of

acts, not only in the acquisition of land for war purposes, but to acts of secretaries of other departments of the Government as well. The rule is universally recognized.

U. S. v. Gettysburg Elec. Ry. Co., 160 U. S. 668, 16 S. Ct. R. 427;
U. S. v. Meyer, 113 Fed. (2d) 387 (certiorari denied, 311 U. S. 706, 61 S. Ct. 174);
U. S. v. Certain Lands in the Town of Narragansett, 145 Fed. 654;
U. S. v. Threlkeld, 72 Fed. (2d) 464; certiorari denied, 293 U. S. 620, 55 S. Ct. 215;
Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361;
Decatur v. Paulding, 39 U. S. 497, 10 L. Ed. 559;
U. S. v. Bethlehem Steel Corp., 315 U. S. 289, 62 S. Ct. 581;
Lee v. U. S., 58 Fed. (2d) 879;
U. S. v. 1997 Acres of Land, 137 Fed. (2d) 8, l. c. 14.

U. S. C. A. Title 50, Sec. 171, gives the Secretary of War authority to purchase real estate for the construction and operation of plants for the manufacture of explosives and other munitions of war and contains a proviso in these words: "Provided, that when the owner of such land, interest or rights, pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay." It is presumed that Congress uses words for some purpose. If the intention had been to provide that the Secretary of War in making such purchases should be limited to the fair, reasonable market value of lands, Congress would certainly have said so instead of using the words "which in the opinion of the Secretary of War shall be reasonable." Many things may be taken into consideration by the Secretary of War in making such contracts, which could not be taken into consideration by a jury under instructions of a court in a condemnation proceeding.

But whatever may have been taken into consideration in making option contracts with other landowners, there is no showing whatever of the consideration of anything except the fair, reasonable market value of the land in the Muschany case, for the bare land itself was purchased at a price which, in the opinion of the Secretary of War, through his duly authorized agents, was considered reasonable. And the petitioners went further and showed by most substantial evidence that the fair, reasonable market value of their land was as much as that which the Secretary of War contracted to pay therefor.

VI.

In obtaining and accepting the offers of petitioners for the sale of their farms the Secretary of War was acting under the powers expressly granted by the Act of July 2, 1917 (C. 35, 40, Stat. 241, Title 50 U. S. C. A., Sec. 171), which provides:

> "that when the owner of such land, interest or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay * * *."

All three judges of the District Court and the Circuit Court of Appeals, as well, have exonerated the representative of the Secretary from any bad faith in the transaction, from which it is a fair inference that the Secretary performed his duty and found the price reasonable before accepting the offer. Such is the presumption and the evidence as well (R. 282).

However, the Circuit Court of Appeals held that the contract resulting from the offer and acceptance was void because it violated the Act of July 2, 1940 (C. 508, 54 Stat. 712), which, after authorizing certain types of construction and purchases by the Secretary, provides:

"that the cost-plus-a-percentage-of-cost system of contracting shall not be used **under this section**; but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." (Emphasis supplied.)

The prohibition is limited to activities "under this section" and there is grave doubt whether it was intended to affect purchases of land under the earlier act, under which the Government buys from the farmer if he submits an offer which the Secretary finds reasonable. The farmer is not a "contractor," his offer is not "cost" and the Secretary cannot buy unless the offer, in his opinion, is reasonable. Congress did not intend to refer to the situation presented in this case when it prohibited the cost plus-a-percentage-of-cost system in transactions under the Act of July 2, 1940. And the legal advisers of the Secretary of War were of that opinion (R. 287).

In addition, the repeal of statutes by implication is not favored. The Act of 1940 can be given full effect by limiting it to transactions "under this section" without extending it to the partial repeal of the 1917 Act. Such was the view taken by the District Court in the case of In re Military Training Camp, 260 Fed. 986, in an almost identical situation.

If it be held that the Act of July 2, 1940, was intended to limit the powers of the Secretary under the earlier statutes, it would seem reasonable that, since the powers granted in the earlier statute were obviously necessary to the effective prosecution of the war, the limiting statute should be strictly construed and given no further effect than Congress expressly required.

The Circuit Court of Appeals has overlooked this sound rule of construction. As its opinion shows, it found that

the system of purchase followed by the Secretary of War sometimes resulted (though not in these cases) in some of the evils frequently exhibited by the cost-plus-a-percentage-of-cost system. So finding, that Court decided that the system used by the Secretary **was** a cost-plus-a-percentage-of-cost system and therefore prohibited by the Act of July 2, 1940.

As we have elsewhere shown, the total cost to the Government under the contract was both known and finally determined at the time the Secretary of War signed it, and thereafter the cost to the Government could not be increased by anyone. This is never true in the case of a cost-plus-a-percentage-of-cost contract, the distinguishing features of which are that the total cost cannot be determined at the time the contract is signed; that the Government loses control over such cost at the time the contract is signed.

It is submitted that the Circuit Court of Appeals erred in construing the Act of July 2, 1940, as limiting the powers of the Secretary of War under the Act of July 2, 1917, and in holding that the contract in question violated the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940.

In view of all of the foregoing arguments and authorities, it is respectfully submitted that the decision of the Court of Appeals herein is, upon principle, out of accord with the applicable decisions of this Court cited above, though the precise question as to the proper construction of Public Act No. 703 in such a case is a question that has never been decided by this Court.

It is earnestly and respectfully urged by the petitioners that all of the points raised in this brief should be passed upon by this Court, although some of them have not been passed upon by the Court of Appeals. If this Court should

hold that the Court of Appeals was in error in holding that the contract in question was void for the reason specified by it, and leave open all of the other questions raised herein, it would mean that counsel for the respective parties would have to journey to the place where that Court happens to be sitting when it again reaches this case and would again have to present the various questions presented herein and which were presented in our brief in the Court of Appeals but were not passed upon by that court; or that the Court would have to take such questions under advisement again, and, in view of the many cases which it has on its docket, they might not be decided until many months have passed. Then if the Court of Appeals decided any of those other points in a way that either of the parties deemed in conflict, either with decisions of this Court or decisions of other courts of appeals than that of the Eighth Circuit, another application for a writ of certiorari might be made to this Court. That would mean additional loss of time and much expense to the parties.

A large number of cases are pending in various courts awaiting the outcome of this case in this Court. By deciding the various questions herein raised and thus disposing of the entire case, as this Court held it had a right to do and as it has done in some cases (Title 28, U. S. C. A., Sec. 247; Fed. Trade Commission v. Pac. States Paper Trade Assn., 273 U. S. 52, 47 Sup. Ct. Rep. 255; Rorick v. Devon Syndicate, 307 U. S. 299, 59 Sup. Ct. Rep. 877), the whole matter can be finally determined, and thus an enormous amount of litigation can be brought promptly to an end and make room on the dockets of various courts for the cases of other litigants. All the points herein were raised in the petition for certiorari, pages 10-11, and in brief in support thereof.

It is respectfully urged that the judgment and record of the Court of Appeals of the Eighth Circuit in this case be quashed by this Court and that the entire matter be decided by this Court as it was by the district court which ordered judgment for the petitioners herein.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 32.

PETITIONERS' BRIEF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 32.

PETITIONERS' BRIEF.

OPINIONS BELOW.

The District Court opinion in this case is unreported, but appears on pages 656 and 657 of the Transcript of the Record. The District Judge, however, in express language set forth in said opinion concurred in and adopted as his own the opinion of the District Judge in the Muschany Case, being the same case as No. 31 on this Court's Docket, which opinion is reported in 46 Fed. Supp. 921 and appears on pages 449 to 460 of the record. The opinion of the Circuit Court of Appeals (R. 690-703) con-

cerning both this case and Case No. 31 is reported in 139 Fed. 2d 661.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides in effect that in any case in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require, by certiorari, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit here to be reviewed was originally entered on December 22, 1943 (R. 704). A motion for rehearing was duly filed by petitioners, who were appellees in said Court, on January 6, 1944, within the time provided by the rules of said Court (R. 737), and said motion for rehearing was denied by said Court of Appeals on January 14, 1944 (R. 739), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the Statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 498), being a right under a contract made under and pursuant to the authority of said above cited statute, which right was denied by the decision and judgment of said Circuit Court of Appeals.

The jurisdiction of this Court is invoked for the following reasons:

1. The Court of Appeals held the contract in issue in the case at bar to be invalid because it held it to be a contract under the cost-plus-a-percentage-of-the-cost system of contracting and therefore in violation of the Act of July 2, 1940, 54 Stat. 712, prohibiting the Secretary of War from entering into contracts under said system (R. 690-703). However, the question as to whether said contract was under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of the prohibition of said statute had been administratively determined by Col. Valliant in the War Department (R. 287-288), which determination, being the discretionary act of an administrative official, was not subject to judicial review and the act of the Court of Appeals in undertaking to review said administrative determination and hold said contract invalid in the face of its own finding that the administrative official acted in good faith (R. 693, footnote 5) constituted so great a departure from the usual course of judicial proceedings as to call for the exercise of the supervision of this Court.

54 Stat. 712, Title 50, App. Sec. 1171, U. S. C. A.;
Title 50, Sec. 171, U. S. C. A.;
Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143;
Switchmen's Union of North America et al. v. National Mediations Board et al., 320 U. S. 397, l. c. 305;
U. S. v. Speed, 8 Wallace 77;
Perkins v. Lukens Steel Company, 310 U. S. 113;
Hall v. Payne, 254 U. S. 343;
Riverside v. Hitchcock, 190 U. S. 316.

2. The holding of the Court of Appeals to the effect that the contract in the case at bar was in violation of the prohibition of the Act of July 2, 1940, 54 Stat. 712

(R. 690-703), against contracts under the cost-plus-a-percentage-of-the-cost system of contracting decides adversely to these petitioners an important question of federal law not yet decided by this Court.

3. The decision of the Court of Appeals to the effect that the contract in the case at bar is invalid because in violation of the aforesaid Act of Congress prohibiting contracts under the cost-plus-a-percentage-of-the-cost system of contracting is squarely in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the same question of law in United States v. Grace Evangelical Church, 132 F. (2d) 460 (C. C. A. 7), and in a second opinion by said Court in said case not yet reported but rendered on August 2, 1944, being Case No. 8443, October Term, 1943, April Session, 1944.

United States v. Grace Evangelical Church, 132 F. (2d) 460 (C. C. A. 7);
United States v. Grace Evangelical Church (not yet reported but decided August 2, 1944, being Case No. 8443, October Term, 1943, C. C. A. 7).

STATEMENT.

This suit was a condemnation suit against these petitioners and their tract of land No. 19 alleged to contain 94.46 acres of land in St. Charles County, Missouri, purporting to be for the purpose of acquiring fee-simple title to said land by the United States for use by the War Department as a site for a TNT manufacturing plant (R. 478-485). Said suit, together with a declaration of taking, was filed on April 15, 1941. Judgment on the declaration was entered on the same day (R. 485-491).

However, on November 19th, 1940, over four months before the filing of the within suit, the petitioners herein executed an option to sell the land involved herein to

the United States for the sum of $12,000.00 (R. 491-495), which said option was accepted on behalf of the United States by Col. R. D. Valliant on November 27, 1940 (R. 495).

These petitioners vacated the property about the fifth of seventh day of December, 1940 (R. 553), although as admitted by respondent's counsel in open court, the government took possession at the time of the arrival of Col. Dutton, the Commanding Officer at the plant site (R. 102), his arrival having been on November 13, 1940 (R. 96).

These petitioners filed an answer to the condemnation petition on June 2, 1941 (R. 491-498), and an amended answer on February 27, 1942 (R. 498-305), in which they alleged the entrance into the aforesaid contract prior to the institution of the suit. A copy of said contract, marked Exhibit "A," was attached to said amended answer and made a part thereof and said contract is set forth in haec verba in the aforesaid original answer (R. 492-495).

Said option, which petitioners allege became a contract of sale when accepted by Col. R. D. Valliant on November 27, 1940 (R. 495), was on a printed form prepared in the War Department (R. 308) and furnished to one R. Newton McDowell, who was to procure the options on approximately 17,000 acres of land for the plant site, as the form upon which the desired land options were to be obtained (R. 231-233).

The terms and provisions of the contract were set forth in said amended answer and the petitioners prayed the Court that commissioners be not appointed as prayed in plaintiff's petition and that the condemnation award be fixed at the contract price and judgment entered thereon (R. 505).

The said contract provided among other things that the vendor should furnish a Certificate of Title prepared by

the Kansas City Title Insurance Company, execute and deliver a General Warranty Deed conveying the land in fee simple to the United States free of all encumbrances including stamps, taxes, etc., have said Deed recorded, make the title merchantable at his own expense if it should prove to be unmerchantable and pay to R. Newton McDowell a commission of 5% of the gross sales price (R. 493-494).

Said contract also provided that if for any reason title to the land should not be approved by the Attorney General, the Government would proceed to acquire same by condemnation proceedings instituted in the District Court under a consent verdict fixing the award at the agreed valuation and would, upon filing its petition in such proceedings, deposit the agreed purchase price with the Clerk of the Court to be disbursed by him pursuant to the decree of the Court (R. 494-495).

Although, after entrance into said contract, petitioners delivered a Deed (R. 552, 586, 587, 588), furnished the required Certificate of Title (R. 580), and although the said Deed was recorded (R. 588, 589), and although the Attorney General in a preliminary opinion approved the title (R. 582, 583), and although the War Department sent the check for the $12,000.00 consideration to the Title Company with instructions to deliver same to petitioners upon being assured that the requirements of the Attorney General's opinions had been met (R. 584), the check was withdrawn from the custody of the Title Company on February 10, 1941 (R. 585), and payment of the consideration was withheld and the instant proceeding was thereafter instituted, as aforesaid, on April 15, 1941 (R. 478-488), but the provision of the aforesaid contract for payment of the agreed upon consideration into the registry of the Court at the time of filing the petition was not complied with.

Prior to entrance into the contract between petitioners and the United States, a contract of agency had been entered into between the United States and R. Newton McDowell by the provisions of which it was agreed that McDowell should negotiate options with all of the landowners in the plant site area and perform certain specified duties in connection therewith and that his sole compensation for services rendered to the Government under said contract should be a 5% commission payable by the vendor on the gross sales price (R. 231, 232, 233). In said contract the Government reserved the right to accept or reject any option submitted (R. 232). McDowell was given no authority to accept an option or bind the United States (R. 231, 232, 233). The evidence shows that this same method of acquisition was used in eight different projects in different parts of the country (R. 288).

Col. R. D. Valliant had been authorized and instructed to undertake the acquisition of all of the property in the Weldon Spring area and was in October, November and December, 1940, chief of the real estate branch of the Quartermaster General's Office (R. 276-277). He had authority to sign contracts on behalf of the United States pertaining to the purchase of real estate for the War Department and also agreements and contracts for personal services in connection with the real estate activities of the War Department (R. 56, 51). He was chief of the real estate section of the Quartermaster General's Office from February 17, 1937, to February 4, 1941, and was a man of vast experience in real estate acquisition (R. 277, 278).

When McDowell, pursuant to his duty under his above mentioned contract with the United States, started negotiations for options some landowners were skeptical as to his authority and formed a committee to obtain informa-

tion. This committee wired Secretary of War Stimson inquiring as to his authority and received the following telegram in response:

"November 9 11OP

E. R. Sutton
Citizens Committee
St. Charles, Missouri

Reurtel Oct. twenty-eight Weldon Spring Mo. area has been approved by War Department for munitions plant site Stop Property will be purchased by Mister R. Newton McDowell and agents representing office of the Q. M. General Stop Mr. McDowell's organization directly represents the Government.

Stimson, Secy. of War,
Washington, D. C."

(R. 52-53).

An amended reply to the amended answer was filed on April 3, 1942, in which the Government attacked the validity of the contract on the ground of alleged fraud and on the ground that it was against public policy and on the further ground that as alleged it was under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of that provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix Sec. 1171, known as Public Act No. 703, which prohibited the Secretary of War from entering into contracts under that system of contracting.

This position was taken by the Government notwithstanding the fact that in almost half of the acquisitions in the Weldon Spring area, all of which followed the same general plan as was used in the case of your petitioners, it had fully paid the consideration provided by the contract and had completed the purchase (R. 280), and not-

withstanding the fact that it had acquired land under the identical plan in eight different projects throughout the country (R. 288).

On account of the large number of cases wherein the validity of the contracts was involved and the importance of said cases, the three District Judges sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet, and he made the rulings on the evidence and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 acres of land in St. Charles County, Mo., 45 Fed. Sup., page 1016.)

The other two Judges went to their respective Court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of that provision of the Act of July 2, 1940, Public Act No. 703, 54 Stat. 712, 50 U. S. C. A., App. Sec. 1171, above cited, which Act removes certain restrictions on the powers of the Secretary of War and gives certain additional powers to him and then prohibits him from using the cost-plus-a-percentage-of-the-cost system of contracting in contracts entered into by him under that Act.

Judge Collet in his opinion, however, made no finding of fraud on the part of anybody connected with the case and expressly exonerated Col. Valliant, the contracting officer, and spoke in high terms of the motives actuating him in his course of conduct. (See U. S. v. 94.68 acres of land in St. Charles County, Mo., 45 Fed. Sup., page 1016.)

It is deemed appropriate to point out that Col. Valliant had, before adopting the plan of acquisition above de-

scribed, considered the question as to whether said plan violated the cost-plus prohibition of the aforesaid Act, and, after being given an opinion in the War Department to the contrary, had determined to use and did use that plan in this and all of the other cases (R. 287, 288).

Judge Davis, in the Muschany case, decided that said Statute did not apply as the contract in question was not under the cost-plus--a-percentage-of-the-cost system of contracting and therefore did not violate that Statute (R. 454). He found that the contract was valid and binding (R. 460) and that there was no fraud, actual or constructive, in the case (R. 458). He also held that the charge of fraud and unfaithful conduct against Col. Valliant is utterly without substance (R. 459).

Judge Davis held further that there was no evidence that the option price of $4500.00 included the amount that the owners wanted for the land plus the commission and the Title Company fee (R. 451).

In this case Judge Moore held the contract valid and held that the options were not void as contracts under the cost-plus-a-percentage-of-the-cost system of contracting (R. 656). He adopted the opinion of Judge Davis in so far as applicable (R. 656), which includes his finding as to the good faith of Col. Valliant, the contracting officer.

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land and that commissioners should be appointed to fix the value of the land in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein were entitled to have judgment entered on the contract for the sum fixed therein, to-wit, $4500.00, together with interest on the sum of money representing the difference between the amount of estimated provisional

just compensation deposited in the registry of the Court and the contract price of $4500.00 pursuant to the terms of the Statute applicable in such cases (R. 658).

The judgment entered by Judge Moore in this case also fixed the compensation at the contract price of $12,000.00, together with interest on the amount of the excess of that price over the amount of the estimated provisional just compensation deposited in the registry of the Court (R. 666).

Separate appeals were taken by the Government in both of said cases after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Andrews case and also at the trial of the Muschany case that the evidence offered in the trial of the Callaway case should be considered in evidence as far as applicable in the trial of said two last mentioned cases, and, therefore, the parties entered into a stipulation (R. 3) which was filed in the Court of Appeals, agreeing that a printed transcript of the record might be prepared and filed and used in that Court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686).

After the taking of all proper proceedings, pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689), and on the 22nd day of December, 1943, said Court handed down an opinion entered in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We consider it proper to mention a few further facts set forth in the evidence and the record:

1. Col. Valliant had to act quickly at a time of great national emergency (R. 302, 303).

2. Andrews did not, in arriving at the price of $12,000.00, fix his net wanted price and add the commission. He first asked $150.00 per acre on the basis of replacement value and then came down to a flat price of $12,000.00. His testimony in that connection is uncontroverted (R. 549-550).

3. The Court of Appeals, as well as the Court below, found that the Quartermaster Department had acted in good faith (R. 693, footnote 5).

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Circuit Court of Appeals erred in undertaking to decide whether the contract of petitioners with the United States fell within the class of contracts prohibited by the cost-plus prohibition of the Act of July 2, 1940 (Public Act. No. 703, 54 Stat. 712), that question having been decided by the Secretary of War through his duly constituted agent, Col. R. D. Valliant, after obtaining a legal opinion of the War Department on the subject (R. 288), and the decision of that question having been the exercise of an administrative discretion vested in him by law, which, since he acted in good faith as found by the Court of Appeals (R. 693, footnote No. 5 of the opinion), is not subject to judicial review.

II.

The Circuit Court of Appeals erred in holding that the option contract of the petitioners with the Government was entered into by the Secretary of War in violation of the prohibition directed to the Secretary of War in the Act of July 2, 1940 (Public Act. No. 703, 54 Stat. 712), because of the use of the cost-plus-a-percentage-of-the-cost system of contracting, and, therefore invalid because said contract lacked the essential elements of a contract under said system of contracting.

III.

The Court of Appeals erred in holding that the method of contracting used in the case at bar gives rise to the evils sought to be prevented by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), and, therefore, falls within the scope of said pro-

hibition while at the same time making a finding of fact that the Quartermaster General's agent, Col. Valliant, acted in good faith for the reason that, if he did act in good faith, he did not omit to do anything necessary to protect his principal, the United States of America, and his power to reject the option was adequate protection for the Government against the payment of inflated values; and, furthermore, being in good faith, his discretionary acts are to be presumed to be right and not subject to judicial review.

IV.

The Court of Appeals erred in finding that William M. Andrews and Bertha L. Andrews arrived at the gross sales price in their option contract by figuring the net wanted price and adding McDowell's 5 per cent commission thereto (R. 700) in the face of the uncontroverted evidence embodied in the testimony of William M. Andrews to the effect that they fixed their first figure of $150.00 per acre, which was rejected, on the basis of replacement value (R. 549), and then, after further negotiation, came down to a lower figure (R. 550).

V.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

VI.

The Court of Appeals erred in not holding that the Government ratified said contract and is bound thereby.

SUMMARY OF THE ARGUMENT.

I.

The act of the Secretary of War through his duly constituted agent, Col. R. D. Valliant, in entering into the instant contract after considering whether it violated the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), and after obtaining a legal opinion on that subject in the War Department to the effect that said prohibition applied to construction contracts and not to real estate purchases (R. 288) was a discretionary act of an administrative officer not subject to judicial review, and his aforesaid determination of the question of law as to whether the contemplated contract violated such cost-plus prohibition was within his discretion and likewise not reviewable by the Courts.

The aforesaid act of Congress had vested broad discretion in the Secretary of War and pertained solely to War Department business and was therefre, in so far as it directed the actions of officials of the War Department, to be construed by the War Department alone unless the War Department acted in bad faith in construing it, in which event only the act becomes subject to construction by the Judicial Department. Both the District Court (R. 459-656) and the Circuit Court of Appeals have made a finding to the effect that there is no question as to the good faith of the Department involved here (R 693, Footnote 5 of Court's opinion).

54 Stat. 712, Title 50 App., Sec. 1171, U. S. C. A.;
Title 50, Sec. 171, U. S. C. A.;
Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143;
Switchmen's Union of North America et al. v. National Mediations Board et al., 320 U. S. 397, l. c. 305;

Comptroller General's Opinon, 20 Comp. Gen. 890;
Marbary v. Madison, 1 Cranch. 137;
Decatur v. Paulding, 14 Pet. 497, 515;
U. S. v. Speed, 8 Wallace 77;
Perkins v. Lukens Steel Company, 310 U. S. 113;
Hall v. Payne, 254 U. S. 343;
Riverside v. Hitchcock, 190 U. S. 316;
Ness v. Fisher, 223 U. S. 683, l. c. 691.

II.

The contract involved here is not a contract under the cost-plus-a-percentage-of-the-cost system of contracting prohibited by the Act of July 2, 1940 (54 Stat. 712), and is not a cost-plus contract of any kind for the following reasons:

(A) At the time of the entering into the contract by the Government the total price of the land was fixed and not undetermined, whereas in a cost-plus contract the cost is undetermined at the time of entrance into the contract.

(B) There was no provision in the contract whereby the land agent, McDowell, was to be reimbursed for his costs in negotiating, whereas a cost-plus contract provides that the contractor shall be reimbursed for his costs.

(C) The contract is a fixed-fee contract because it was known when the contractual obligation arose that McDowell's fee was $600.00, or 5 per cent of $12,000.00. It was, however, not a cost-plus contract; but if it should be held to be a cost-plus contract, it would then be a cost-plus-a-fixed-fee contract, specifically authorized by the statute.

(D) The method of land acquisition used by the War Department in the acquisition of the land of these petitioners and others, which method among other things involved a payment of a commission on the gross sales

price on the basis of a percentage of that price, was implicationally but most definitely recognized by Congress as being legal by an Act of Congress approved on July 1, 1943, long after enactment of the Act of July 2, 1940, prohibiting contracts under the cost-plus-a-percentage-of-the-cost system of contracting upon which prohibition respondent relies, the later act above mentioned being the "Military Appropriation Act, 1944," 57 Stat. 347, l. c. 369, the pertinent part thereof reading as follows:

> "Sec. 12. No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of **any commission on any land purchase contract in excess of 2 per centum of the purchase price.**"

We submit that it is self-evident that if the Congressional intent actuating the enactment of the prohibition against cost-plus-a-percentage-of-the-cost contracts had been to prohibit land purchase contracts providing for the payment of a commission based on a percentage of the purchase price, Congress would not have enacted the later act limiting the commission provided for by land purchase contracts to 2 per centum of the contract price and the fact that it did enact the later act entirely destroys the force of respondent's contention that the cost-plus prohibition of the Act of July 20, 1940, was meant to apply to contracts of this nature for the purchase of land and strongly supports the interpretation placed on the said prohibition by the War Department itself to the effect that said prohibition applied to construction contracts and not to contracts for the purchase of land (R. 288).

Military Appropriations Act, 1944, 57 Stat. 347, l. c. 369;

United States v. Grace Evangelical Church, 132 F. (2d) 460 (CCA 7);

United States v. Grace Evangelical Church (not yet reported but decided August 2, 1944, being Case No. 8443, Oct. Term, 1943, CCA 7);
Standard Oil Company of Louisiana v. Fontenat, 198 La. 643, 4 Southern (2d) 634;
Opinion of Judge Advocate General SPJGC, 1943 9887;
Digest of Opinion of Judge Advocate General 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38, 322, dated Dec. 8, 1943.

III.

If the Quartermaster General acted in good faith, as was found by both the District Court and the Circuit Court of Appeals (R. 693, Footnote No. 5 of the Court's opinion), the method of contracting used by him did not bring about the evils sought to be avoided by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, as held by the Circuit Court of Appeals, for the reason that he reserved the right to reject any or all of the options submitted, thereby avoiding any liability of the Government, either to the landowners or McDowell, as to any option so rejected. This power to reject the options was adequate means in his hands for the protection of the Government, and if he acted in good faith, as found by the courts, he did not and would not fail to use it in any instance in which it should be used. The evils which Congress had in mind in the aforesaid prohibition, such as inflated costs, could not therefore be here present.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;

Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38, 322, dated December 8, 1943;
United States v. Grace Evangelical Church, 132 F. (2d) 460.

IV.

The finding of the Circuit Court of Appeals that petitioners fixed their net wanted price and added McDowell's 5 per cent commission thereto and thus arrived at the gross sales price stated in the contract is contrary to uncontroverted evidence, but even if it were true it would not make petitioners' contract a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

V.

The principle of estoppel is applicable against the Government as to the contract of these petitioners, the Government having entered into the contract in its proprietary capacity as distinguished from its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Wright, 78 U. S. 648;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

VI.

The United States, with full knowledge of all the facts pertaining to the entrance into the contract and full knowledge of the terms and provisions thereof, and after having entered into possession under and by virtue thereof, retained said possession for a period of time long before

the declaration of taking was filed in this proceeding and thereby ratified the contract.

North American Transportation & Traction Co. v. United States, 253 U. S. 330;

Ford v. United States, 17 Court of Claims Report 60;

Moran Brothers v. United States, 39 Court of Claims Reports 486.

ARGUMENT.

I.

The Act of July 2, 1917, Title 50, Sec. 171, provided, in substance, that the Secretary of War might acquire lands needed for sites for plants for the manufacture of explosives either by condemnation or by purchase at a price fixed by the landowner reasonable in the opinion of the Secretary of War. This vested in the Secretary a discretion either to acquire such land by condemnation or by purchase. It further vested in him a discretion to determine whether or not a price in a landowner's offer is reasonable, and if reasonable, to purchase same at that price.

While that act required that the Secretary purchase only at a price reasonable in his opinion, it placed no limitation whatever on the landowner in fixing his price. This left the landowner free to fix his price at any figure that he desired and the elements that he may consider in fixing his price are not material in such a transaction.

It is contended by the Government, however, and held by the Circuit Court of Appeals in this proceeding, that the contract entered into is a type of contract forbidden by a provision of the Act of July 2, 1940, 54 Stat. 712, Title 50, App. Sec. 1171, and that the Secretary of War being prohibited from entering into the contract by that act, the contract is void. The pertinent portion of the said Act is as follows:

> "• • • That, (a) in order to expedite the building up of the National Defense, the Secretary of War is authorized, out of the monies appropriated for the War Department for National Defense purposes, for the fiscal year ending June 30, 1941, with or without advertising (1) to provide for the necessary construction, rehabilitation, conversion, and installation at

military posts, depots, stations, or other localities of plants, buildings, facilities, utilities and appurtenances thereto (including government owned facilities at privately owned plants and the expansion of such plants and the acquisition of such land, and the purchase or lease of such structures as may be necessary), for the development, manufacture, maintenance and storage of military equipment, munitions and supplies, and for shelter at such places and under such conditions as he may deem necessary; * * * Provided, that the limitations contained in Sections 1136 and 3734 of the Revised Statutes as amended, and any statutory limitation with respect to the cost of any individual project of construction shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: * * * Provided further that the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The last cited act is an act giving the Secretary of War many powers to do various things and removing certain statutory restrictions on his power. It also vests great discretion in the Secretary of War. **It pertains solely to the War Department's business.**

After these powers are given to the Secretary the following provision is made:

"Provided further that the cost-plus-a-percentage-of-the-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The prohibition of the use of the cost-plus-a-percentage-of-the-cost system of contracting above quoted is the provision of said act which the Circuit Court of Appeals says is violated by the contract in question here. This contract was in the form of an option prepared by the War Department whereby the landowner, for a consideration of $1.00, agrees that he will sell his land to the United States of America for a stated price, give immediate possession of the land to the Government upon acceptance of the option, and upon payment of the purchase price pay the Government's agent, McDowell, who solicited the option on behalf of the Government, a commission of 5 per cent of the gross sales price (R. 492-495). The option involved in the Andrews transaction was accepted by the contracting officer in the Quartermaster General's office on behalf of the Government (R. 495).

The Circuit Court of Appeals holds that this contract entered into by the War Department was in violation of the above quoted provision of 54 Stat. 712, prohibiting the War Department from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, and is therefore invalid.

We submit that in the first place there is grave doubt whether 54 Stat. 712, which limits its prohibition to contracts entered into by the Secretary of War under its own provisions, has any application whatever to the contract of these petitioners, said contract having been entered into by virtue of the authority granted in the Act of July 2, 1917, Title 50, Sec. 171, U. S. C. A., as a basic act and the authority granted in the Act of September 9, 1940 (Public Act No. 781, 76th Congress, 54 Stat. 872), known as the Second Supplemental National Defense Appropriation Act, 1941, as an appropriation act. In fact, in the President's letter to the Secretary of War approving the Weldon Spring project (R. 51), he states that his approval is under said Act of September 9, 1940.

However, even if it should be held that the contract here involved was entered into under and pursuant to the aforesaid Act of July 2, 1940, we submit that said last mentioned act vested in the Secretary of War, the discretion to determine whether or not any contract which he contemplated entering into violated said cost-plus prohibition. This is true for the reason that said act placed said limitation upon his contracting power and thereby imposed upon him the duty to consider and determine the question as to the meaning of said limitation with reference to every contemplated contract. He could not perform his functions without interpreting this provision of the law and it necessarily follows that the discretion to construe this provision was vested in him. The doctrine that when certain duties cannot be performed by an administrative official without his making an interpretation of the law, the discretion to interpret the law is vested in him, is supported by the ruling of this Court in Butte, A. & P. Ry. v. U. S., 290 U. S. 127, l. c. 143. The following is, we believe, a pertinent quotation from the opinion of the Court by Mr. Justice Brandeis:

> "Since authority to pass on the meaning of the word deficit and upon each of the other questions of construction is essential to the performance of the duty imposed upon the commission and Congress did not provide a method of review, we hold that it intended to leave the Government as well as the carrier, remediless whether the error be one of fact or of law."

The same doctrine is expressed in the opinion of this Court written by Mr. Justice Douglas in Switchmen's Union of North America et al. v. National Mediation Board et al., 320 U. S. 397, l. c. 305.

Not only was the discretion vested in the War Department to construe the meaning of the term "cost-plus-a-

percentage-of-the-cost system of contracting," but we submit that **that discretion was exercised by the War Department and that the Department decided that its plan of acquisition did not violate that prohibition** as shown by the testimony of Col. Valliant, the contracting officer, (R. 288), to the effect that **that question had been considered by them and that the opinion given him was that it applied to construction contracts and not to contracts for the purchase of land** and as was further shown by the fact that he subsequently accepted the option of these petitioners and others and by the fact that the Secretary of War himself **was familiar with the plan of acquisition** as evidenced by the telegram sent by him to the landowners' committee **confirming to said committee the plan to purchase the land through the agency of McDowell and the Office of the Quartermaster General** (R. 52-53).

We further submit that in view of the fact that **the contracting officer acted in good faith** as held by both the District Court (R. 459, 656) and the Circuit Court of Appeals (R. 693, Footnote 5 of Court's opinion) his exercise of that discretion was the exercise of **such an administrative discretion as is not subject to judicial review and as was absolutely conclusive and final** and that the Court of Appeals was **precluded from holding** that the contract so entered into violated the aforesaid prohibition of said act and was therefore void.

This principle has recently been set forth in an opinion of the Comptroller General of the United States reported in 20 Comp. Gen. 890. A quotation from the opinion follows:

> "It is to be observed too that Section 2 of said act excepts several classes of contracts from the provisions of the act and **necessarily in awarding contracts, a certain amount of discretion must be exercised in the way of determining whether a particular contract**

> **falls within the exceptions. It has been held that where a discretion of this kind has been conferred upon an officer and a contract is made in which that discretion has been exercised that the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise.** U. S. v. Speed, 8 Wall. 77. The record contains nothing to indicate that the omission of the requirements of the eight hour law from the subject contract was merely an oversight or was **for the purpose of contravening the law; and in the absence of such a showing it is to be presumed that the contracting officer was acting in accordance with law and considered** in the **necessary exercise of his discretion that the contract fell within one of the classes of exceptions** and was not **subject to the provisions of the law."**

The doctrine of non-reviewability of the discretionary acts or determinations of administrative officials has been proclaimed by this Court time and again throughout its history. The following are some of the statements of that doctrine by Justices of this Court:

In Marbary v. Madison, 1 Cranch 137, Mr. Justice Marshall said:

> "* * * And whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive * * *. The conclusion from this reasoning is that where the heads of Departments are the political and confidential agents of the executive * * * **to act in cases in which the executive possesses a constitutional or legal discretion,** nothing can be more perfectly clear than that their acts are only politically examinable."

In Decatur v. Paulding, 14 Pet. 497, 515, Mr. Justice Taney said:

> "The Court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. * * * **The interference of the Courts with the performance of the ordinary duties of the Executive Departments of the Government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.**"

In U. S. v. Speed, 8 Wallace 77, Mr. Justice Miller said:

> "It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred on an officer or a board of officers and **a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend** on the degree of wisdom or skill which may have accompanied its exercise."

In Perkins v. Lukens Steel Company, 310 U. S. 113, Mr. Justice Black, speaking for the Court, said:

> "Courts have never **reviewed** or **supervised the administration** of such an executive responsibility, **even where executive duties require the interpretation of the law. Judicial restraint of those who administer the government's purchasing** would constitute a break with settled judicial practice, and a departure into fields hitherto wisely and happily apportioned by the genius of our policy to the administration of another branch of the Government * * *. We find nothing in the act indicating any intention to abandon a principle acted upon since the nation's founding under which the **legislative and exectuive departments have exercised complete and final authority to enter into contracts for Government purchases.** The committee hearings and reports and the construction of the

measure by its sponsors disclose no purpose to **invoke judicial supremacy over agents chosen by Congress to perform these duties.**"

We submit that it was the duty of the Secretary of War to acquire real estate in a time of great national emergency for a site for a munitions plant. Vast discretion had been conferred upon him by Laws of Congress. He had the discretion to acquire by purchase. While he was subject to the directions and restrictions imposed upon him by Congress, we submit that under the doctrine of the above cited cases it was **his function** and **not the function of the judiciary to construe** those directions and restrictions and that **his interpretation thereof, both on questions of fact and of law, are final and conclusive** and that, therefore, the question as to whether or not the cost-plus-a-percentage-of-the-cost prohibition was violated by the plan of acquisition used and whether or not the contract of these petitioners is void because in violation of said prohibition, **was finally and conclusively determined in the negative by the War Department** and that neither the District Court nor the Court of Appeals could properly undertake to decide **that predetermined question** and that the judgment of the Court of Appeals holding the contract of these petitioners to be invalid should therefore be reversed.

It is true, of course, that where an Act of Congress prescribing things to be done by an administrative officer or board, and vesting discretion in said board specifically provides for judicial review, such discretionary determinations are then subject to judicial review, but such provision was not made in the aforesaid Act of July 2, 1940.

It is also true that the acts and the determinations of administrative officers may properly be reviewed by the Courts and sometimes have been in cases in which there is fraud or bad faith or willful determination to violate the law on the part of the administrative officer or where

his determination is arbitrary and capricious or palpably erroneous. None of these elements, however, are present in the administrative determination involved in the case at bar. As has been hereinabove pointed out the District Court (R. 459, 656) and the Circuit Court of Appeals (R. 693, Footnote 5 of the Court's opinion) have made findings to the effect that there was no fraud or bad faith on the part of the administrative officer.

The following is a quotation of the finding of Judge Collet on that subject in the Callaway case, the companion case to the cases at bar, which was decided adversely to the landowner:

> "With a high sense of honor and duty and considering the plan adopted to be the best one to most likely accomplish the objective his superior had ordered, he utilized the plan and accomplished the ultimate objective assigned, the necessity for which will not now be questioned. If actual fraud or bad faith entered into any of these transactions, there is not the slightest bit of evidence that he was in any way a party to it or had the slightest knowledge of its existence. In our judgment the evidence shows the Quartermaster General honorably discharged the trust imposed upon him."

These findings negative any willful determination on his part to violate the law and they negative negligence on his part or arbitrariness or capriciousness and since the determination made by him involves a question upon which **Judicial minds have differed,** that question certainly must be **subject to construction** and his determination of the question certainly could not be considered as so palpably erroneous as to invoke judicial review thereof.

In Hall v. Payne, 254 U. S. 343, Mr. Justice McKenna, speaking for this Court, said:

"From the act and secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a **possible** construction of the act * * *. **He could not administer and apply the act without construing it and its construction involved the exercise of judgment and discretion.** The view for which the relator contends is not so **obviously and certainly right** as to make it plainly the duty of the Secretary to give effect to it. The relator therefore, is not entitled to a writ of mandamus."

In Riverside v. Hitchcock, 190 U. S. 316, Mr. Justice Peckham, speaking for the Court, said:

"Whether he decided **right or wrong is not the question.** Having jurisdiction to decide at all, he had necessarily jurisdiction and it was his duty to decide as he thought the law was **and the Courts have no power whatever under the circumstances to review the determination** by mandamus or injunction."

In Ness v. Fisher, 223 U. S. 683, l. c. 691, Mr. Justice Van Devanter, speaking for the Court, said:

"The Secretary's decision respecting the relator's application was not **arbitrary or capricious but was based upon a construction of Section 2 which was at least a possible one.** * * * So at the outset we are confronted with the question, **not whether the decision of the Secretary was right or wrong,** but whether the decision of that officer, **made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion may be reviewed** by mandamus and he be compelled to retract it and give effect to another, not his own and not having his approval."

By way of conclusion of our argument on non-reviewability, we submit that there is a distinction to be drawn between administrative determinations of a regulatory

nature, which subject individuals to regulation, and administrative determinations pertaining solely to the Government's own business as, for instance, its purchasing activities, as is the administrative determination in the case at bar.

The Solicitor General in his brief in the case of Perkins v. Lukens Steel Company, 310 U. S. 113, very aptly said:

> "It is as necessary for the Government to buy and contract as it is for the Government to tax. The ordinary functions of the Government, **to say nothing of the needs for National Defense**, cannot be carried on without buildings, furnishings and supplies. **The purchasing and contracting activities of the Government are in so sense regulatory in character and do not subject individuals or private interests to any restraint.** It would be an **entirely novel principle** and **a serious threat** to the **efficient and flexible functioning of the Government, if the Courts should undertake to interfere with or control the Government's purchasing activities.**"

II, III AND IV.

It is contended by the respondent (see pages 8 and 9 of Respondent's Memorandum on Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit) that because the contracts in question provided for the payment by the United States of a gross sales price out of which the Government's purchasing agent was to be paid a 5 per cent commission, those contracts manifestly contemplated the use of a cost-plus-a-percentage-of-the-cost system of contracting and that, furthermore, since the Court below held that the gross sales price specified therein did include 5 per cent for the Government's purchasing agent that system of contracting was actually used in these cases and they say that the

purpose of Congress in enacting the proviso of the 1940 Act was to proscribe the percentage method of contracting because of its inherent tendency to increase costs to the Government. They are evidently assuming that Congress intended by the enactment to denominate every percentage contract, a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

We submit, however, that such intent in the enactment of said proviso can hardly be imputed to Congress in the light of the fact that since said enactment it has enacted 57 Stat. 347, being the "Military Appropriations Act, 1944," Section 12 of which is as follows:

> "No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

We submit that if Congress had intended by the cost-plus proviso to proscribe a real estate purchase plan whereby a Government purchasing agent could be paid a commission on a percentage basis out of the purchase price it would not have passed an act which makes it impossible to pay an agent on any other basis than on the basis of a percentage of the purchase price. We further submit that the term "purchase price" used in this more recent enactment can mean nothing but the gross sales price because it is always the gross sales price that the purchaser pays. The inescapable conclusion then, is that prior to the enactment of this recent statute, the law allowed payment to the agent of the Government of a commission on the gross sales price limited only by the discretion of the contracting officer and that since the enactment it allows payment of a commission on the gross sales price not in excess of 2 per cent. The contract of these petitioners was dated

prior to the enactment of the percentage limitation (R. 495). We submit that according to prevailing real estate custom, the commissions of real estate agents are always computed on the basis of a percentage of the purchase price and that any prudent man in fixing the price at which he will sell his land, has a right to take into consideration the expenses of the sale, including the agent's commission. We submit that in view of the light thrown upon the Congressional intent by this more recent act the whole structure of respondent's contention is utterly destroyed.

At this point we desire to allude to respondent's assertion and the assertion of the Court of Appeals (Respondent's above cited brief, page 9, and R. 699, 700) to the effect in substance that petitioners fixed their gross sales price by estimating their net wanted price, computing a percentage thereon and adding that percentage to the net wanted price, thereby arriving at the gross sales price. We submit that had they gone through that mental process in arriving at their price they nevertheless would not thereby have violated any law of Congress, since Congress seems to contemplate the payment of a commission on the purchase price from which price of course, by established custom, all expenses of the sale are to be paid and a vendor has a right to remember that certain expenses are to come out of the purchase price and to consider that fact in fixing his selling price.

We further submit, however, that the record does not show that the petitioners in these cases went through such a mental process in fixing their gross sales price. Neither was there any finding of the trial Courts to that effect, Judge Davis in the Muschany case having held that there was no evidence that the option price included the amount that the owners wanted for their land plus the commission and Title Company fee, which we submit was the equiva-

lent of holding that the aforesaid mental process had not been carried out by the vendor in reaching the option price. While Judge Moore, in the Andrews case, made no specific finding of fact on this question, he did adopt the opinion of Judge Davis (R. 656). Furthermore, we submit that the uncontroverted evidence in the Andrews case precludes the possibility that these petitioners used this mental process in arriving at their gross sales price. Mr. Andrews testified that he first asked $150.00 per acre for the land on the basis of **replacement value** and that that offer was rejected and that, after negotiation, he came down to the flat figure of $12,000.00, which was accepted. This uncontroverted evidence precludes the possibility that these petitioners used the mental process attributed to them in arriving at their price.

We submit that the contract of these petitioners is not under the cost-plus-a-percentage-of-the-cost system of contracting for the further reasons hereinafter set forth.

At the time of the passage of the Act of July 2, 1940, 54 Stat. 712, the terms "cost-plus-a-percentage-of-the-cost" and "cost-plus-a-fixed-fee" both had a definitely established meaning known to Congress and known to the War Department and public contractors generally largely as a result of the first World War. Although judicial definitions of these different types of contracts are rare, there is a definition of each type in Standard Oil Company of Louisiana v. Fontenat, 198 La. 644, l. c. 670-671, 4 Southern 2d 634. A quotation from the opinion follows:

> "The independent contractor on 'a cost-plus-a-percentage-of-cost' basis is one who undertakes the construction required by the contract and the owner reimburses him for the costs of materials, labor, etc.; and the contractor's profit or gain is to be a certain percentage of the total cost of the project." • • •
>
> "The third or new type of contract is called a 'cost-

plus-a-fixed-fee' contract, which means that the contractor is to be reimbursed for the costs of materials, labor, etc., by the owner and is to receive a fixed fee as his profit or gain. This fee which is fixed as his profit or gain for the performance of the contract is identical with the profit or gain which the contractor on a 'cost-plus-a-percentage-of-the-cost' contract receives **in the respect that neither contractor takes any chance of losing.** The profit or gain on a 'cost-plus-a-fixed-fee' contract is dissimilar from the profit or gain on a 'cost-plus-a-percentage-of-the-cost' contract only in the respect that **the amount is not exactly determined in advance.** The only difference between the 'cost-plus-a-fixed-fee' and the 'cost-plus-a-percentage-of-the-cost' on the one hand and a 'lump sum' contract on the other, is that in the two former cases the contractor's profit or gain is assured, whereas, on a 'lump sum' contract, it is possible that the anticipated and expected profit may turn into a loss because of a low bid or advances in the prices of materials or the cost of labor."

The essence of the cost-plus-a-percentage-of-the-cost system is that the Government commits itself in advance by binding obligation to pay **an amount not specified in the contract**, which amount is to be ascertained **in the future** by **computation of the total cost**, and at the time of entrance into such a contract the Government also commits itself to pay in addition thereto a percentage of said **then unknown amount** as compensation to the contractor.

In the contract between the Government and these petitioners the Government did not bind itself to pay an unknown cost, but bound itself to pay $12,000.00 for the Andrews' land. There was no provision in the contract whereby the price could exceed that amount. There was no plus item payable to these petitioners; on the contrary, there were some minus items for them to consider. Petitioners had agreed in the contract to pay the Government's

agent McDowell out of this $12,000.00 a commission of 5 per cent thereof, or $600.00, and to pay the other expenses of the sale, and this amounted to an agreement to pay the Government's obligation to McDowell under its contract with him which provided that the 5 per cent commission payable to McDowell by the vendor on the gross sale price was to be the **sole** compensation for the **services rendered thereunder** (R. 232, Govt. Exhibit M-5).

We submit that this was not a cost-plus contract at all, but that it was a fixed-fee contract because the compensation to McDowell was **fixed at five per cent of the gross sales price, which amounted to $600.00**, said sum to be **paid out of that gross sales price** and not to be **an additional $600.00 over and above the gross sales price.** The contracting officer **knew at the time that he bound the Government**, that McDowell's commission was $600.00, and that it **could not exceed** that amount. Furthermore, since it was a fixed-fee contract we submit that even if it should be construed to be a cost-plus contract, which construction we contend would be erroneous, it would then fall into the category of a cost-plus-a-fixed-fee form of contract specifically authorized by the Act of Congress, which act says,

> "but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War,"

and would therefore be legal and valid because specifically authorized by the act.

In this connection we think it pertinent to refer to an opinion rendered by the Judge Advocate General on July 8, 1943, SPJGC 1943/9887, to the effect that the mere fact that the fee in a cost-plus-a-fixed-fee contract is determined by a stipulated percentage of the estimated cost

which may later prove to be greater or less than the actual cost of the work is not objectionable and does not render the contract in violation of the cost-plus-a-percentage-of-the-cost prohibition. The opinion further comments that as a matter of fact the percentage method is the only method that can be used in fixing such a fee because of the following quoted provision in Executive Order No. 9001:

> "In the absence of such limitation, the fixed fee to be paid the contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this order shall not exceed seven per centum of the estimated cost of the contract."

It is obvious that in order to determine whether the seven per cent limitation of the fixed fee, demanded by the executive order, is being complied with, the contracting officer would have to use a percentage method of fixing the fee in any cost-plus-a-fixed-fee contract.

The above cited opinion of the Judge Advocate General is digested in the Bulletin of The Judge Advocate General of The Army, July, 1943. This Bulletin is compiled by the Judge Advocate General as a Government Bulletin and, according to a letter of Gen. G. C. Marshall, Chief of Staff, appearing as a preface, is published for the information and guidance of all concerned.

A quotation from said digest of said opinion in said Bulletin, appearing on page 278 thereof, is as follows:

> "A contract under which the fee is determined by a stipulated percentage of the estimated costs is a cost-plus-a-fixed-fee contract; this does not violate the prohibition against the cost-plus-a-percentage system of contracting because such fee is fixed **in advance of performance** and is **not subject to subsequent modification**."

The fee of McDowell provided for in the contract of petitioners with the Government **was fixed at the time of entrance into the contract by the Government and was not subject to subsequent modification.**

Furthermore, in another opinion of the Judge Advocate General (SPJGC 2174, May 27, 1942), the cost-plus-a-percentage-of-the-cost system of contracting is defined. The following is a quotation from the opinion:

> "In general it may be stated that the designation **cost-plus-a-percentage-of-the-cost** system of contracting is intended to refer to that method of contracting whereby the compensation of the contractor is determined by a percentage of the costs of labor and material and the direct incidental expenses of the project: **which costs and expenses are paid by the Government.** Under such plan the compensation of the contractor is **greater proportionately as the cost of the project increases.** The system has been condemned because of the incentive to the contractor to **increase the cost to the Government.**"

It is obvious, of course, that the contract of these petitioners with the Government being to sell the land at a **fixed price** left no room for such incentive as is referred to in the last quoted opinion.

The Comptroller General, in an opinion rendered December 8, 1943, being B.38322, held a contract which actually followed the cost-plus-a-percentage-of-the-cost form of contract up to **a fixed ceiling price** to be a cost-plus-a-fixed-fee form of contract and therefore valid because the ceiling price fixed by the contracting officer amounted to a fixing of the fee and held that in view of the contracting officer's **discretionary decision that the $6,000.00 ceiling price was reasonable, no evil could result from the contract.**

There has been a contention by the Government, which contention seems to have influenced the Court of Appeals, to the effect that the plan of acquisition used in bringing about the contract of petitioners with the Government had present in it an incentive to McDowell, the land optioner, to promote high prices in order that his 5 per cent commission would be greater and that that assumed proposition in some way or other renders the contract of petitioners a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

This theory, however, overlooks some important factors. It overlooks the fact that the contract between McDowell and the Government (Govt. Exhibit M-5, R. 231-233) provided that his sole compensation was to be a five percent commission payable to the vendor while at the same time reserving the right to the Government to **reject** any or all options submitted. Under such a state of facts, if the contracting officer should have exercised his right to reject the options, McDowell's compensation would have been nothing. That being true, McDowell had an incentive to procure the options at such a figure as it was reasonable to believe would be approved. This is exactly what happened in the transaction involving these petitioners. They at first submitted an option in favor of the United States to McDowell's man Williams on the basis of $150.00 per acre, but McDowell sent Williams back to them and Williams procured the option here involved at the lower price of $12,000.00.

Furthermore, regardless of McDowell's incentive, whether it was to lift the prices up or keep them down, he was **a mere negotiator**, and when the contract actually came into being by the acceptance of the option by the contracting officer, **the incentive of McDowell could no longer operate** as is not the case under the cost-plus-a-percentage-of-the-cost system, and the contracting officer

immediately before the contract came into being had ample power to prevent any evil consequence to the Government from any incentive that might have actuated McDowell while the option was in the process of negotiation by simply **rejecting the option.** As Mr. Justice Murphy has aptly said in United States v. Bethlehem Shipbuilding Co., 315 U. S. 289, "the United States is armed with both an actual and potential arsenal of powers adequate to protect it in dealing with private persons," and we submit that **it surrendered none of these powers** in this transaction. The contracting officer not only had the power to protect the Government, but did so. He exercised his discretion and determined the price to be reasonable. Both the District Court and the Circuit Court of Appeals have found that there is no question as to his good faith, and if he acted in good faith the presumption of law is that he did everything that it was his duty to do. In Bank of The United States v. Dandridge, 12 Wharton U. S. 64, the opinion of the Court contained the following statement:

> "The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do or will omit to do aught which his official duty requires should be done."

We suggest that if the Government had contracted with McDowell to buy the land himself and had at the same time agreed to buy it from him at the price which he paid for it plus 5 percent, that would have been a cost-plus contract; but such was not the arrangement. McDowell had no power to buy the land but was a mere negotiator and the Government had specifically reserved the right to reject the negotiated options, **in which event McDowell was to get no compensation.** If, on the contrary, the option was accepted, **McDowell would receive only a fixed per-**

centage of the fixed price and he was not to be reimbursed for his expense in negotiating same.

We direct the attention of the Court to the fact that a contract containing provisions identical with the provisions of the contract under consideration in this case was held valid by the Court of Appeals of the Seventh Circuit in United States v. Grace Evangelical Church, 132 Fed. 2d 460, and that on a second appeal and in a second opinion not yet reported but having been decided on August 2, 1944, being Case No. 8443, October Term, 1943, April Session, 1944, said contract was held to be valid and not to be under the cost-plus-a-percentage-of-the-cost system of contracting.

V.

The Government is estopped from denying the validity of the contracts by reason of the fact that in contracting with the petitioners herein it was acting in its proprietary capacity as distinguished from its sovereign capacity, and that when it acts in said proprietary capacity it is subject to the general rules of estoppel applicable to private persons and by reason of the further fact that long after it had obtained possession of the land under the contracts and after it had failed to do its part in the completion of the transaction, and for a long period before it had filed this proceeding, it retained the fruits of the contract, to-wit, possession of the land.

VI.

In view of the fact that the Government went into possession of the land under the contract in December, 1940, and remained in possession until June 2, 1941, the date of the filing of the declaration of taking, it ratified the

contract, and if the contract was, as a matter of fact, invalid, it would be validated by the aforesaid ratification.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1944.

JAMES KARL MUSCHANY and VERA MUSCHANY, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 31

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. 32

JOINT REPLY BRIEF TO BRIEF OF RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1944.

JAMES KARL MUSCHANY and VERA MUSCHANY, *Petitioners*,

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JOINT REPLY BRIEF TO BRIEF OF RESPONDENT.

STATEMENT.

We, of counsel for the petitioners herein, find ourselves at variance with counsel for respondents with respect to certain matters set forth in respondents' statement and also in its argument as matters of fact, and we, therefore, respectfully direct the attention of the Court to such statements and to our points of disagreement therewith.

Respondent states that McDowell called a meeting of the landowners in the area, which was held on November 6, 1940, and attended by many of the landowners, their attorneys and interested persons. (Brief, p. 5.) In support of the proposition that McDowell called this meeting, appellant cites record pages 109, 115 and 141. These citations

do not support the proposition that McDowell called the meeting of landowners. In fact, the record discloses that the only persons who testified anything about said meeting were the following, all being witnesses for the Government: George Williams (R. 107), R. A. Langenbacher (R. 114), Thomas H. Rogers (R. 140), Rudolph H. Sinock (R. 151), Darby Tally (R. 189), Ford W. Thompson (R. 199, 201, 203, 204), and Joe Wentker (R. 206, 207), and that none of them testified that McDowell called said meeting or as to who called it. On the contrary the unnumbered paragraphs in the beginning of a letter being Government's Exhibit G-11 (R. 235, 236), and more particularly the fourth unnumbered paragraph of said letter, shows that said meeting was called by the committee described in the preceding paragraphs of said letter and that the committee invited McDowell to be present at this public meeting in order that he might answer questions on behalf of the War Department that might be asked by the farmers.

Respondent says (Respondent's brief page 6): "When McDowell sought to agree with the landowners upon the option prices, they followed the procedure outlined at the meeting and mentioned in the circular of the landowners' committee, i.e., they agreed upon the value of the property, and added to that the commissions, recorder's fees, and documentary stamp taxes." Respondent then cites record 127-131, 140-141, 150, 163, 167-168, 173, 186-188, 196-197 and price breakdowns at record 268-274, 328-332. These citations do not show the above quoted statement of respondent to be true of the transactions of either petitioners, Muschany or petitioners Andrews, nor does it show it to be true as to the transactions involved in the other two hundred and fifty-eight options. The record citations given by respondent are all that are available in the record in support of said statement, and in view of this state of the record, we submit that the percentage of accuracy in said statement cannot be very high.

Respondent says (brief, page 20): "McDowell generally accepted the owners' asking prices", and in support of the statement cites record 66-67, 140-141, 150, 163, 167-168, 196. An examination of the record as cited will show (R. 66-67) that Miss Callaway sought $125.00 per acre, and got an option for only $115.00 per acre. Record pages 140 and 141 shows that the price was arrived at by agreement, but is silent as to whether the landowner at first contended for a higher figure. The same is shown by the citation to record 150. The citations to record 163 and to record 167 and 168 and to record 196 seem to indicate that there was no argument as to price between McDowell and the respective owners.

The record shows that there were 270 separate parcels in the area (R. 280). There is testimony in the record as to price in only twenty-four tracts out of the 270, these cases being Sutton estate (R. 60), Callaway (R. 66), Kaut (R. 127, 128, 129, 130), Rogers (R. 140, 141), Sinock (R. 150), Walker (R. 163), Seib (R. 168, 169), Albrecht (R. 186), Kolodzey (R. 262), Muschany Brothers (R. 267, 268), Mary Keiser (R. 269), Nicolai (R. 270), Nell Fulkerson (R. 270), Mildred A. Stewart (R. 271), Lonergan (R. 271, 272), Morris Muschany (R. 272), Mary Schneider (R. 273), Darst Drainage District (R. 327, 328), Hamm (R. 328), Awbrey Heirs (R. 329, 330), Kessler (R. 330), Oscar L. Snyder (R. 331), Domineck Estate (R. 331, 332), Karl Muschany (R. 355), Andrews (R. 549, 550). In three of these cases—Callaway (R. 66), Albrecht (R. 186) and Andrews (R. 549, 550)—the record shows that McDowell or his agents did not consent to the first price, but got the owners down to a lower figure than they at first contended for. In three cases—Walker (R. 163), Seib (R. 167, 168) and Daniel (R. 196)—the record seems to show no contention between McDowell's representatives and the landowner as to price. In the other eighteen cases in which there was evidence as to price, the record is silent as to whether McDowell or his agents contended with the owners about the price. The

utmost that is shown then in support of appellant's statement that McDowell generally accepted the landowner's first figure is that in three cases out of 270 in the area McDowell submitted the owner's price without argument.

Respondent says (Brief, Page 20), "Another landowner was told by an agent of McDowell that the latter would himself like to add $50.00 an acre to the owner's asking price but the owner declined to adopt the suggestion." Respondent is referring to the Daniel testimony (R. 197). The testimony seems to show that the witness said in substance that after he had signed the option, McDowell's man said that he would like to add fifty dollars an acre more for the land—that it was worth fifty dollars an acre more; but that McDowell's man did not say that he would give him fifty dollars more, and that he, the witness, had told McDowell's man that the amount agreed upon was all he wanted. If this be the true meaning of the evidence it is somewhat different from the generous proposition by the land optioner and the righteous rejection thereof by the witness set forth in respondent's statement.

By way of conclusion of our statement, we desire to direct the attention of the court to the fact that there is no evidence in the record to show that any of these petitioners arrived at their option price by determining their net wanted price and adding the commission thereto, a mental process much abhorred by respondent throughout this litigation. There was such evidence as to other and unrelated transactions, which evidence was admitted over the objections of counsel for these petitioners.

We also submit that the record as a whole shows that the respondent Government sought to acquire the land and that petitioners did not seek to sell the land (R. 548-549). We submit that the letter contract between McDowell and the Government shows that the services performed by McDowell in these transactions were performed for the government and not for the landowner. (R. 231-233.)

SUMMARY OF THE ARGUMENT.

I.

Both the question as to whether or not the contracts in issue were under the cost-plus-a-percentage-of-the-cost system of contracting within the meaning of the prohibition of the Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171) and the question as to whether or not said contracts are contrary to public policy were predetermined in the negative by the War Department before entrance into same, and that determination was within the discretion of the War Department and was, therefore, final and conclusive and not subject to judicial review, and the Circuit Court of Appeals was therefore precluded from holding the contracts to be invalid on the ground that they violated said prohibition, or were contrary to public policy.

II.

McDowell was not the landowners' agent for the purpose of procuring a contract of sale from the United States of America, and the contract, therefore, did not violate the alleged principle of public policy forbidding contracts providing for compensation contingent upon success in procuring a contract with the United States.

III.

The contracts do not violate public policy by reason of any alleged conflict between the personal interests of McDowell, the Government's agent, and the interest of his principal, the United States of America, growing out of the commission provision, because: (1) he was a mere negotiator with no authority to bind the Government, and the Government had the present power to protect itself from the results of any selfish incentive that may have grown out of such alleged conflict of interests, by rejecting the option when submitted, and (2) Congress, by specific enactment,

recognized the legality of the system of acquiring land by payment of commissions to brokers on the basis of a percentage of the purchase price. (Section 11 of the Military Appropriations Act, 1942, 55 Stat. 366 l. c. 394, approved June 30, 1941.)

ARGUMENT.

I.

Cost-Plus-A-Percentage-of-the-Cost, and Public Policy Questions Predetermined by War Department, and Not Reviewable.

Respondent says: "The present contracts are in effect cost-plus-a-percentage-of-the-cost contracts for the acquisition of * * * land." (Brief, page 32.) Respondent also says in support of its contention that the contracts are contrary to public policy: "The obvious conflict between the interest of the Government and that of its agent entitles the United States to avoid the contracts if in its judgment it is advisable to do so to safeguard the public interest." (Brief, page 19.)

The questions as to whether or not the plan of acquisition, including the type of contract to be entered into between the Government and McDowell, and the type of contract between the Government and the landowner was prohibited by the cost-plus-a-percentage-of-the-cost prohibition, and as to whether or not it was against public policy, were decided by the War Department and by the contracting officer, in the negative, before the contract was entered into. The contracting officer was vested with discretion to decide these questions of law; being so vested with such discretion, if not directly by legislative enactment, then indirectly by inescapable inferences from specific legislative enactments imposing upon him the duty to enter into contracts, but to refrain from entering into certain types of contracts. This made it his duty (1) To enter into contracts and (2), before doing so, to decide whether the contract contemplated was

of the prohibited type and not to enter it if it was of that type, and it was just as certainly his duty to decide whether the contemplated contract was against public policy and to refrain from entering into it if it violated public policy. The record shows (R. 288) that he decided that the contract was not under the cost-plus-a-percentage-of-the-cost system of contracting, and it being his duty also to decide the public policy question, we submit that there is a presumption of law to the effect that he considered and he decided that question and determined that the contemplated contract was not contrary to public policy before entering into it. If it be true then that he was vested with the discretion to decide these questions, and if it be true that he exercised that discretion and determined that the contracts neither violated the cost-plus prohibition nor public policy, we submit that his determination of these questions was a final and conclusive determination not subject to judicial review, and that the Circuit Court of Appeals was precluded from finding to the contrary and declaring the contracts invalid. We submit that if administrative agencies cannot predetermine questions of law as to meaning of the many restrictions upon their contracting power both in the statutes and in the common law, there can be no security in contracting with the Government because whoever contemplated entering into a contract with the Government would have to employ a lawyer to ascertain whether it was in accord with a multitude of statutes and departmental regulations and with the common law. This, in turn, would greatly hamper the Government in its contracting activities, particularly in times of great national emergency when it is necessary for it to accomplish results quickly as was the case when the contracts in issue here were entered into.

In this connection we wish again to direct the attention of the court to *United States v. Speed*, 8 Wallace 77. In this case the facts were that an officer was required by Statute to advertise for bids before entering into a contract unless the emergency should be such as not to admit

of the delay incident to such advertisement. The officer entered into the contract without advertising for bids and subsequent events demonstrated that the thing contracted for was not needed at all and the Government repudiated the contract. The question as to whether the emergency was such as justified entrance into the contract without advertising for bids was a mixed question of fact and of law, for the contracting officer to determine before entering into the contract. The question of fact was the extent of the emergency. The question of law was whether the extent of the emergency was such as to bring the act of waiving the advertisement for bids within the permissive exception of the Statute. This Court, speaking through Mr. Justice Miller, said:

> "It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred on an officer or a board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise."

It can be readily seen that this court in that case held the contract valid even in the face of the fact that subsequent events demonstrated that the Army had had no use for the meat provided for, said holding being based upon the fact that it was a discretionary determination within the power and authority of the contracting officer, and that the validity of a contract flowing from such a determination does not depend upon the correctiness of the determination.

In like manner 54 Stat. 712, and Title 50, Sec. 171 imposed upon the Secretary of War the duty to determine how and when he should acquire land, and if he determined he should acquire it by contract, said 54 Stat. 712 prohibited him from entering into any contract under the cost-plus-a-percentage of the cost system of contracting, and the public policy prohibited him from entering into any contract contrary to public policy; and we submit that he was, therefore, under

the doctrine of this court expressed in the opinion above cited, confronted with the duty and vested with the discretion to determine whether the contemplated contract was of the type prohibited by the cost-plus-a-percentage-of-the-cost prohibition, and whether it was contrary to public policy. We submit that the record shows that he determined the first question in the negative (R. 288), holding that the contemplated contract was not contrary to the cost-plus-a-percentage-of-the-cost prohibition, and that there flows from the fact that he entered into the contract a presumption of law to the effect that he determined the second question in the negative, holding that the contemplated contract was not contrary to public policy, and we submit that both determinations were final and conclusive, and not subject to judicial review, and that the Circuit Court of Appeals was precluded from holding the contracts to be invalid either as against public policy or as against the statutory prohibition.

We submit that the doctrine of the non-reviewability of administrative acts performed in the course of the transaction of the ordinary business of the Government is proclaimed in the opinion of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, set forth on page 27 of the original Andrews brief, wherein Mr. Justice Black, speaking for the Court, says:

> "Judicial restraint of those who administer the government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of the Government."

We submit that if the Court will not restrain an act, it will certainly not, at a later date, invalidate that act.

II.

Contracts in Issue Here Do Not Constitute McDowell Landowner's Agent for Purpose of Procuring Sale of Land to the Government.

Respondent contends that the contracts in question violate a rule frequently applied by this court, that contingent fees for the procurement of Government contracts are contrary to public policy, and that they violate the Act of July 16, 1862, 12 Stat. 577, making it an offence for any officer or agent of the United States to receive or agree to receive from any person any money or other valuable consideration for "procuring or aiding to procure any contract from the United States or from any officer or department thereof," and Respondent says that any such contract or agreement may, according to the provisions of the Statute, at the option of the President, be declared void. (Brief, pages 11 and 23.)

In this connection we wish first to point out that we have never contended that petitioners were unaware, at the time of the negotiation of the contracts, of the fact that they were to pay the Government's commission obligation to McDowell along with the other expenses of the sale out of the gross sales price. The face of the contract provided for this and petitioners were aware of the provisions. What we have contended is that petitioners did not go through the mathematical process of figuring the five per cent commission on a net wanted price and adding the figure arrived at to the net wanted price, and thereby arrive at the gross sales price stated in the option. We desire to make it very clear, however, that we contend that if petitioners had gone through that mathematical process in arriving at the gross sales price, that fact would not invalidate their contracts, because, under the law, the Government had a right to pay a commission to a broker in the course of land acquisitions, and it made no difference whether it paid it directly or indirectly. We submit that the statute quoted on page 32 of

the original Andrews brief and hereafter to be discussed, shows plainly that the Government had the right to pay such commissions. In the light of the foregoing comments, we respectfully point out that petitioners did not employ McDowell as their agent to procure contracts of sale from the Government. We submit that there was no dual agency and that McDowell was not the agent of the landowner, but of the Government alone. There is no contract of agency between McDowell and the landowner. He was not engaged by the landowner to procure the contracts from the Government. The contract between the landowner and the Government which respondent construes to be a contract of agency between McDowell and the landowner is not signed by McDowell. While the landowner in said contract agrees to pay McDowell a commission of 5 percent of the gross sales price as full payment to McDowell for services rendered in procuring the sale, preparing the deed and arranging for settlement and closing of the transaction, we submit that those services were all rendered or to be rendered by McDowell to his principal, the United States of America, and were not rendered to the landowner. The landowner had no need for an agent to procure a sale of the land to the Government, but the Government had need for an agent to procure a sale by the landowner to the Government. The Government was insisting that the landowner sell, and sell quickly, and get out immediately, and was appealing to his patriotism in order to induce him to part with his cherished possessions. If the landowner could have, with any hope of success, employed an agent to induce the Government not to disturb him in his possessions, but to go elsewhere with its project, he would have been happy to do so.

Can anyone believe that when families were distressed because they had to leave their homes, the heads of families were employing a soliciting agent to procure a sale of their homes to the Government? There was to be a great and righteous war for the protection of the homes of America. Can anyone believe that two hundred and seventy land-

owners, in a peaceful rural community, most of them home-owners, were employing an agent to procure a sale of their property?

The thing that the landowners contracted with the Government to do in the aforesaid provision of said contract was to pay its agent McDowell out of the gross sales price the 5 per cent commission that it had agreed with McDowell in its contract with him (Government's Exhibit M-5, R. 232) should be the sole compensation for his work under said last-mentioned contract, just exactly as said landowners contracted in other provisions of their contract with the Government to pay the other expenses of the sale.

This is borne out not only by the contract between the Government and McDowell, but by the testimony of Col. Valliant (R. 209) to the effect in substance that it was understood when the plan was devised that the landowner might take into consideration the commission to McDowell when he fixed the gross price and that that commission, along with other expenses of the sale, would be paid by the landowner out of that gross sales price in order to save the Government the trouble and delay of preparing several different vouchers.

It is clear then that the landowner employed no agent under a contingency contract for the purpose of corrupting Government officials, as was done in some of the cases cited by Respondent in its brief.

Furthermore, the contract between the landowner and the Government did not become a completed contract until approved, accepted and adopted by Col. Valliant, and when that was done McDowell's right to 5 percent of the gross sales price was vested and not contingent.

We submit further that if McDowell, because of the aforesaid provision of said contract, had been an agent of the landowner as well as of the Government, such dual agency would have been known to the Government; and, in view of the fact that the Government had the right to reject the options, could have done no harm. *United States* v. *Grace Evangelical Church*, 132 Fed. (2nd) 460 (C. C. A. 7, 1943.)

III.

The Contracts Do Not Violate Public Policy by Reason of Alleged Conflict Between McDowell's Self Interest and the Interest of His Principal, the United States of America Because of the Commission Provision.

It is contended by respondent (Brief, pages 13 and 14), that a conflict was established between the self-interest of the Government's agent and his duty to serve the interest of his principal, the United States of America, and that this conflict renders the contracts void as against public policy. In support of this proposition respondent cites the dissenting opinion of Judge Evans in *United States* v. *Grace Evangelical Church*, 132 Fed. 2nd 460. The majority opinion in that case, however, held a similar contract not to be contrary to public policy. Further more, the same case was heard by the same Court on a second appeal with like result, having been decided on August 2nd, 1944, being Case No. 8443, October term 1943, April Session 1944, and being not yet reported.

In further support of this proposition they cite the testimony of Under Secretary Patterson given April 29, 1941, before the subcommittee of the Committee on Appropriations, House of Representatives, 77th Congress, 1st Session, on the Military Establishment Appropriation Bill for 1942, P. 80. (Respondent's brief, pages 15 and 16.) In this connection we direct the court's attention to the fact that an examination of this testimony shows that it was given long after the Weldon Spring property and the property involved in the other seven land acquisition projects, in which the same method of acquisition was used, was acquired (R. 288). When the Under Secretary testified, the great rush was over. He had the land needed and was in a position to devise what he considered more wise plans of acquisition, but he did not go so far as to say that the plan under which he had acquired many thousands of acres of land in eight different and widely scattered projects was contrary to public policy.

Respondent quotes Under Secretary Patterson in his testimony before said committee as characterizing the commission system of land acquisition as "a system that I will not defend" (brief, p. 16). Under Secretary Patterson did so mention the system in his testimony on Page 106 of the report of the hearings before the aforesaid subcommittee of the Appropriations Committee of the House, but the fact that he would not defend it does not make it contrary to public policy. He also made the following statement as shown by page 76 of the same report: "We hold no brief for the cost-plus-a-fixed-fee plan for building camps. We use it when pressed for time which was doubtless the use contemplated by Congress in authorizing such contracts". The Secretary held no brief for cost-plus-a-fixed-fee contracts and he refused to defend the system of acquiring land by paying a commission on the purchase price to an agent, but he recognized that both systems were legal and he wanted to hold on to both systems for use in emergency. The very act of Congress with reference to which he was then testifying which had not been enacted on April 29, 1941, the date of his testimony, but which was approved on June 30, 1941, being the Military Appropriations Act, 1942, 55 Stat. 366 l. c. 394 contained the following provisions, being Section 11 thereof:

> "No part of any money appropriated herein or included under any contract authority herein granted, shall be expended for the payment of any commission on any land purchase contract in excess of two per centum of the purchase price."

We now direct the Court's attention to the fact that when the Under Secretary was testifying before the above mentioned Committee, the following question and answer occurred as appears on page 106 of the report of said hearing:

> **Mr. Snyder**—You referred in your Senate testimony to commissions on land purchase contracts. The Navy

Appropriations Bill for 1942, as it will become law, carried a 2 per cent maximum. That probably may have to be written into this bill. Have you any comment to make on that?

Mr. Patterson—I would rather not see the limitation in. We are now buying most of our land through the Soil Conservation Service of the Department of Agriculture. The costs vary under that procedure according to the efficiency of the agents employed by the Conservation Service. **I regret very much to say that on the first ones the costs were quite in excess of what we had been paying real estate agents under a system that I will not defend.** Due either to putting too many men on the job, or the men not having enough to do, General Somervell told me that the costs had run up **as high as 10 per cent.** (Emphasis supplied.)

We submit that it appears from the foregoing that the Under Secretary considered the system which he would not defend to be nevertheless legal and a useful system to hold on to for use in emergency, and was even unwilling to have the statutory restriction of the commission enacted into law.

Not only did the War Department oppose the limitation of the commission to 2 per centum of the purchase price before the subcommittee of the Committee on Appropriations of the House, but as shown on pages 46 to 49 inclusive of hearings before the subcommittee of the Committee on Appropriations, United States Senate, 77th Congress, First Session, H. R. 4965, a bill making appropriations for the military establishment for the fiscal year ending June 30, 1942, and for other purposes,—General Brehon Somervell appeared before the subcommittee on June 21, 1941, and opposed said limitation of real estate commissions. The following is an exact copy of the testimony:

General Somervell. . . .

The second point is not so important. It is with respect to the limitation of 2 percent on commissions on real estate, the limitation which is contained on

page 71, section 11, lines 13 to 17, in the print the members of the committee have before them, and on page 72, lines 12 to 16, in the print which I have.

We can get along all right with that limitation, except on the small projects, **and except in those cases where it is necessary to get property very promptly. In those cases we would like to have authority to pay a little more than 2 percent.** It is obvious that if you have a big job 2 percent is ample for any commission you have to pay; but if we find it desirable to include the cost of the surveys and of abstracts in a lump-sum contract with a broker, then this 2-percent commission requirement would be a handicap. (Emphasis supplied.)

However, I do not want to stress that point too much. I merely want to say that we can operate more expeditously without that limitation, and that we can give you our assurance that we will not pay more than 2 percent except in the cases I have indicated.

Senator Thomas: You are speaking about commissions on real estate transactions?

General Somervell: Yes, sir.

Senator Thomas. Does the bill prescribe a limitation of 2 percent?

General Somervell. Yes, sir.

Senator Thomas. You think that limitation should not be in the bill?

General Somervell. Yes, sir. We certainly do not intend to pay more than that, except in a case where we have a small job involving a large number of contracts, in which case we think perhaps that limitation would be too restrictive.

Senator Thomas. You think the restriction serves no good purpose; is that correct?

General Somervell. Yes, sir.

Senator Thomas. While you are discussing this same matter of commissions, let me mention the fact that the bill provides 7 percent, as I recall, as a limitation upon the commissions to be paid to contractors and engineers. Is that correct?

General Somervell. Yes, sir; 6 percent of contractors and engineers and 7 percent for an operating contract.

Senator Thomas. The same arguments you urge against the 2-percent limitation would likewise be ap-

plicable to the limitation to 6 percent and 7 percent, would they not?

General Somervell. No, sir. Those are all right. You can leave those as they are.

Senator Thomas. Is it not a fact that sometimes on small jobs you find it necessary to pay more than a 6-percent or a 7-percent fee?

General Somervell. No, sir. That is enough.

Senator Thomas. Then the 6-percent and 7-percent fees are all right?

General Somervell. Yes, sir; that is enough. Another 7-percent restriction is mentioned in there, and I should like to speak about it. But so far as these fees are concerned that limitation is all right.

Senator Adams. With reference to the matter of commissions, of course in our ordinary civil activities commissions ordinarily are paid to an agent by the seller.

General Somervell. That is correct; **but when it is a forced sale, which is the case in practically all our transactions, there is no impetus from the seller through the broker,** as there is in the case of the ordinary civil transaction. (Emphasis supplied.)

Senator Adams. And at times you use the broker to secure options without the seller knowing that the property is to be used for Government purposes?

General Somervell. We try to keep it quiet. You know how difficult that is.

Senator Adams. Yes.

General Somervell. But our primary use for brokers is in situations in which **we have more or less exhausted the Government facilities available for acquiring the real estate.** We use the Department of Agriculture and the other War Department agency, the Corps of Engineers, to make surveys and to get abstracts and things of that kind. **We have gotten to the point where we have all this personnel involved in the picture.** In other words, there is no need for us to ask the Corps of Engineers to acquire some land for us, because all they would do would be to use the same people all of us are using. All of us are using the Government people for that purpose. (Emphasis supplied.)

Under similar circumstances we can go to a private broker and can get the thing done **a lot faster and a lot**

cheaper, in the over-all picture, than we could by attempting to hire new people in the Government service. That is the whole story. (Emphasis supplied.)

Senator Thomas. General, let me call your attention to section 7 of Public Law 48 of the Seventy-seventh Congress, which reads as follows:

"No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

If this bill should carry a similar provision how would that affect your work? Would it affect it adversely?

General Somervell. It would slow us up in the purchase of small tracts. That is what it would do. [Emphasis supplied]

Senator Thomas. During the next fiscal year how many small tracts do you think you will have occasion to purchase, if any?

General Somervell. Probably 20.

Senator Thomas. What will be the effect if this language remains in the bill?

General Somervell. It will mean that we shall have to get the employees in our Department to carry on those negotiations, **if we cannot get brokers to do the job at 2 percent.** [Emphasis supplied]

Senator Adams. To what extent have you had recourse to condemnation proceedings?

General Somervell. We are doing so as a fixed principle, Senator. In other words, when we go in to take a large tract, under our present policy we file a declaration of taking, and put the whole job under condemnation. Having done that, we proceed to negotiate with the owners, on the basis of the appraisals which formed the data on which we filed.

Senator Adams. And the commission is paid to the agent or representative who negotiates for you?

General Somervell. Yes, sir.

Senator Adams. After you really commence your condemnation proceedings?

General Somervell. When we resort to condemnation proceedings, of course the broker is not in the picture at all. Occasionally we hire a man for closings,

but on those closings the man is hired as an employee of our office, and not as a broker. We pay him a fixed salary. The only times we use a broker are in cases in which, **for reasons of speed and because we have a property offered to us at a price we can accept, we do not have to resort to condemnation.** [Emphasis supplied]

Perhaps this is getting a little confusing. Our fixed policy is to resort to condemnation as a general rule. When we do not resort to condemnation, that is the exception; and under the exception we hire brokers occasionally to do the job. As I have said before, this is not a very serious restriction, but it is a restriction. . . ."

We submit that in the position taken both by Under Secretary of War Patterson and General Somervell it is crystal clear that neither of these gentlemen considered the commission system of acquisition illegal or contrary to public policy, and that Congress, by enacting the above quoted statute, overrode all possible questions as to its exclusion from the prohibition against contracts under the cost-plus-a-percentage-of-the-cost system of contracting and as to its harmony with public policy, and affirmed the legality of the system.

The Weldon Spring acquisition clearly falls within the meaning of the testimony of General Somervell when he spoke of "those cases where it is necessary to get the property very promptly" (R. 302, 303).

Respondent contends, however, that the above quoted statute does not mean what it says or, in other words, that instead of meaning to limit the commission of two per centum of the purchase price, it means to limit it to two per centum of the estimated price (Brief, page 34).

In support of this theory Respondent cites the method sometimes used for fixing the fees of engineers and architects, whereby the cost of the thing to be constructed is estimated and the fee of the engineer or architect is fixed by calculating a given percentage of that estimated cost and fixing the amount arrived at as the amount of the fee.

We submit, however, that this method of fixing the fee in a cost-plus-a-fixed-fee contract cannot be taken as a model for use under the statute above quoted, for the reason that said method is based upon a specific statutory provision applying to cost-plus-a-fixed-fee contracts which is entirely apart from the statute pertaining to commissions on land purchases. The specific provision referred to is embodied in the Act of September 9, 1940, 54 Stat. 872, l. c. 873, known as the Second Supplemental National Defense Appropriations Act, 1941, and is in the following words:

> "PROVIDED, FURTHER, that the fixed fee to be paid the contractor as a result of any such public works contract hereafter entered into shall not exceed 6 per centum of the *estimated* cost of the contract, exclusive o fthe fee, as determined by the Secretary of War." (Emphasis supplied.)

We submit that had the word "estimated" been left out of the last quoted provision, it would have been impossible to fix the fee in advance by a percentage method because the cost cannot be definitely known until completion of the project. The word "estimated" was left out of the commission-limitation statute and it is therefore impossible to fix the commission in advance in dollars and cents because the purchase price cannot be known in advance. It may be that if Congress had not recognized the fact that purchase prices cannot be estimated in advance, it would have inserted the word "estimated" before the words "purchase price" in the commission-limitation provision.

We submit that while legislative history cited by Respondent does not bear out its construction of the commission-limitation statute, nevertheless even if it did so, the plain meaning of the English used in said statute should prevail in construing it. It has been held by this Court that in construing a statute the intention of Congress is to be ascertained by the light of the meaning of the English used in the Act rather than by the light cast upon the subject by reference to its legislative history; *United States* versus

Trans-Missouri Freight Association, 41 L. Ed. 1007 l. c. 1020, 166 U. S. 290.

Before concluding our argument we deem it appropriate to take note of some comments contained both in respondent's brief and in the opinion of the Circuit Court of Appeals, whereby it is sought to deduce, from testimony extraneous to the cases at bar and relating to wholly different transactions, which testimony was allowed to be incorporated into the record over the objection of counsel for petitioners herein, with due exception taken, certain inferences tending to reflect both upon the wisdom of the plan of acquisition and the integrity of the Government's agent McDowell. Both respondent (Brief, pp. 20 and 21) and the opinion of the Circuit Court of Appeals (R. 697) refer to the Daniel testimony (R. 197) and both of them apparently undertake to draw an inference from it to the effect that McDowell's representative was endeavoring to induce Mr. Daniel to demand an additional $50.00 per acre for his land. We submit that the evidence warrants no such inference. An examination of the record will show that Mr. Daniel said, in substance, that there was no argument between him and McDowell's man about the value of the property before the option was signed but that after the option was signed, McDowell's man commented that he would like to add $50.00 per acre more for the land, that the land would be worth $50.00 per acre more, but that McDowell's man did not say that he would give it to him.

We submit that under this state of the evidence it is entirely reasonable to believe that McDowell's agent, who in turn was the agent of the Government, was conscientious in the belief that the price asked by the landowner was less than the value of the land, but understanding that it was the prerogative of the landowner to fix the price, and feeling an obligation to his principal to resolve all doubts in favor of the Government, refrained from expressing his opinion as to value until after Mr. Daniel had signed the option, and then expressed his opinion but made no offer to raise the price.

We submit that it is entirely possible that Mr. Daniel's land was worth more than he asked. The record shows that Mr. Daniel was a non-resident landowner living in St. Louis (R. 195). He may have been mistaken as to the value of his land as non-resident landowners frequently are. The record shows that a new highway bridge across the Missouri River and a superhighway had recently been constructed near this area (R. 595), and the record shows further by the testimony of the Government's witness, Warren R. Dalton, that the value of the Andrews tract, another tract in the Weldon Spring area, had increased 300 percent by reason of the said new bridge and superhighway (R. 603).

Under this state of facts it is entirely possible that there had been an enhancement in the value of the land which was not fully appreciated by Mr. Daniel. In this connection it should be remembered that Mr. Daniel's property consisted of a 3-acre tract with a house on it and that an increase of $50.00 per acre would amount to only $150.00, and it would not be remarkable in view of the circumstances above outlined if Mr. Daniel had underestimated its value to that extent.

We, therefore, submit that in view of the foregoing the most harsh inference that might be drawn from the facts as to the conduct of McDowell's man on this occasion is that in view of his position as an agent for the Government it might have been slightly indiscreet for him to indicate to Mr. Daniel that he, Mr. Daniel, had made anything but the best possible bargain in his sale to the Government.

We next allude to the reference to the Kolodzey deal cited by respondent (Brief p. 20) and by the Court of Appeals (R. 697) whereby both apparently undertake to draw an inference that McDowell acted selfishly in the transaction from the fact that he first recommended an offer to sell the property to the Government for $4500.00, and thereafter recommended an offer to sell the same property for $10,000.00, and later when condemnation was under consid-

eration recommended a declared value in the contemplated condemnation suit of $4800.00.

We submit that bare facts unexplained are sometimes susceptible of erroneous construction. An examination of the facts shown by the record (R. 262-267) reveals that Martha Pallardy, purporting to be attorney-in-fact for Agnes Kolodzey, who lived at Yorktown, Texas, executed an option as to a certain tract of land in the Weldon Spring area as attorney in fact for said Agnes Kolodzey agreeing to sell the land described to the United States Government for $4500.00. McDowell, under date of November 19, 1940, transmitted said option to Colonel Valliant, the contracting officer in the War Department, recommending acceptance of said option as representing "a fair value to the United States Government". The option was accepted. Thereafter the Kansas City Title Insurance Company discovered that the power of attorney under which Martha Pallardy was purporting to act was four and one-half years old. McDowell contacted Miss Kolodzey directly immediately after that and was informed that she had executed a power of attorney to Martha Pallardy to execute leases in connection with a rock quarry on the property, but that she had not been consulted about selling the land to the Government for a TNT plant.

She said she would not cooperate in a sale for the figure fixed by the attorney in fact but would sign another option offering to sell her land for $10,000.00. McDowell accordingly took into consideration the fact that adjoining land was being optioned to the Government for $50.00 per acre more than the amount fixed by the attorney in fact, and by letter of January 11, 1941, recommended acceptance of an option naming a price of $10,000.00 as "a fair value to the United States Government". The second recommendation was not accepted by the Quartermaster General's Department, and by letter of January 18, 1941, Major Harrold, of the Quartermaster's office, wrote McDowell to forward his

request for condemnation of the Kolodzey tract. Accordingly, by letter of February 26, 1941, McDowell wrote to the Office of the Quartermaster General that in view of the fact that the land would have to be condemned by the Government, it was his opinion that $75.00 per acre would be a fair appraisal value. The price of the tract at $75.00 an acre, amounted to $4800.00.

We desire to comment that it is apparent that McDowell had committed himself to the proposition that the sale at $4500.00, offered by Martha Pallardy, the attorney in fact, represented "a fair value to the United States Government" but he had not committed himself to the proposition that it represented *a fair value* to the owner Agnes Kolodzey. Therefore, a later statement that an offer of Agnes Kolodzey to sell at a price of $10,000 was on a basis representing "a fair value to the United States Government" was not inconsistent with the earlier statement, because the fact that the lower price represented a fair value to the Government, did not necessarily indicate that the higher price was not also a fair value to the Government.

We submit that after that, when he recommended $75.00 per acre, or $4800.00, as a fair appraisal value for the purposes of condemnation, he was probably taking into consideration the fact that as a practical matter the condemnor always contends for a low price in a condemnation suit and the condemnee always contends for a high price, and that the result is usually an award somewhere in between the two figures. He was also probably taking into consideration the fact as indicated by the language in his letter "in view of the fact that the Government will have to obtain this land through condemnation, it is our opinion that $75.00 per acre is a fair appraisal for the land" that the measure of value in condemnation limits the value to market value whereas when the Government undertakes to purchase at a negotiated price the will of the seller is a potent factor.

We submit that an examination of this transaction reveals nothing reflecting upon McDowell's integrity as an agent for the Government, but if it should be held to be such a reflection it serves to vindicate the plan of acquisition, because the record shows that the contracting officer performed his function and rejected the $10,000 option recommended by the agent.

Respondent says (Brief p. 18) "the prices recommended by McDowell were not checked by any appraisals or any first-hand investigation of the particular tracts; or record of sales in area; at most the prices were subject to comparison one with another on the basis of the bare recommendations of McDowell (R. 277, 281, 283, 305, 311) * * *. In these circumstances the critical nature of McDowell's negotiations is readily evident. *United States* versus *Carter*, 217 U. S. 286, presented a similar situation with respect to administrative approval of contracts tainted with a conflict of interest on the part of the Government's agent".

We comment that the portion of the foregoing statement purporting to be a statement of the facts as shown by the record does not present the whole truth. The record shows that Colonel Valliant, the contracting officer, went in person to the area and "drove around and over and criss-crossed throughout the site" in order "to examine the proposed site and familiarize myself with its topography and condition, agriculturally especially, and anything else that might be of value to me in considering the price that would be fair to pay for the land." (R. 291.)

We submit that it might well be true that in view of the great urgency for speed in acquisition this was the maximum that could be done by the Department through its contracting officer in the way of acquiring necessary information. Scientific appraisals require much time, and while they are desirable under ordinary circumstances there appears to be no law establishing them as a condition precedent to a purchase of land by the Government. If this be the true state of the matter, then certainly it is also true

that the landowners were not responsible for that condition of affairs.

On the other hand, if this was not the true state of affairs and if as a matter of fact the necessity for speed in acquisition was not so compelling as to justify dispensing with appraisals and other informative processes often used, then and in that event the principle voiced by this Court by Mr. Justice Murphy in *United States* versus *Bethlehem Shipbuilding Company*, 315 U. S. 289, to the effect that the United States is "armed with both an actual nad potential arsenal of powers adequate to protect it in dealing with private persons" is entirely applicable and if it did not avail itself of those powers it, itself, is at fault in not so doing and the landowner is not chargeable with blame for the Government's default in the matter. The landowners when confronted with the necessity of vacating their property and finding other homes were justified in leaving the performance of Departmental duties to the War Department.

With reference to *United States* versus *Carter*, 217 U. S. 286, cited as aforesaid by respondent to establish its claim that "it is no answer to suggest that the contracts were approved by an Officer of the War Department after submission by McDowell" (Brief p. 17), we submit that the difference in the essential facts of that case from the facts in these cases make the finding of the Court in that case inapplicable for the purpose for which it is cited.

In that case the agent was definitely guilty of fraud, whereas there is no finding of or evidence of fraud on the part of McDowell in these cases. In that case the agent was an Army Officer being compensated for his services to the Government by a fixed salary. In these cases McDowell was to be compensated only by his commissions. In that case the Army Officer agent had a secret agreement with the contractor for a share of the profits derived from the contract unknown to his superior officers, whereas in these cases McDowell had no secret agreement with anybody and

the Department was fully aware of the commission provision, having itself devised the whole plan of acquisition.

In view of the foregoing we earnestly submit that the judgment of the Circuit Court of Appeals of the Eighth Circuit in each of the cases at bar should be reversed.

Respectfully submitted,

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Nos. ~~711~~ and ~~726~~

In the Supreme Court of the United States

OCTOBER TERM, 1943

JAMES KARL MUSCHANY AND VERA MUSCHANY,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 711

JAMES KARL MUSCHANY AND VERA MUSCHANY, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 726

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

In No. 711 the district court wrote a memorandum opinion (R. 449–460) which is reported in 46 F. Supp. 921. In No. 726 the district court wrote a memorandum opinion (R. 656–657) which is unreported. The opinion of the circuit court of appeals (R. 690–703) is reported in 139 F. 2d 661.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered December 22, 1943 (R. 703–704). Petitions for rehearing were denied January 14, 1944 (R. 723, 739). The petitions for writs of certiorari were filed February 17, 1944, and February 24, 1944, respectively. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the option contracts involved contravene the Act of July 2, 1940, 54 Stat. 712, prohibiting the use of the cost-plus-a-percentage-of-cost system of contracting.

STATUTE INVOLVED

The Act of July 2, 1940, 54 Stat. 712, provides in part:

> That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, building, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants,

and the acquisition of such land, and the purchase and lease of such structures, as may be necessary) for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter * * * *Provided further,* That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.[1]

STATEMENT

The Act of July 2, 1940, *supra,* provided for the more expeditious acquisition of property "out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941." The Military Appropriation Act of September 9, 1940, 54 Stat. 872, made additional appropriations of money for the fiscal year 1941 for national defense purposes.

On October 17, 1940, in a letter to the Secretary of War, the President, under the Act of

[1] The proviso of this section has been continued in effect and made applicable to moneys appropriated for the War Department for war purposes. Act of June 30, 1941, sec. 9, 55 State. 366, and Act of June 5, 1942, sec. 13, 56 Stat. 314, 50 U. S. C. appendix, Supp. II, sec. 773. The settled policy of Congress to outlaw cost-plus-a-percentage contracts is also shown by other statutes in which similar provisos appear. Act of June 28, 1940, sec. 2 (a), 54 Stat. 676; Act of May 2, 1941, sec. 2 (c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 838.

September 9, 1940, 54 Stat. 872, approved the construction of a TNT and DNT plant at Weldon Springs, Missouri (R. 51, 309). The Secretary of War directed the Quartermaster General of the Army to acquire a site for the plant in St. Charles County, Missouri (R. 52–53). At the direction of the Quartermaster General, Colonel R. D. Valliant, Quartermaster's Corps, in charge of the Real Estate Branch of the War Department, undertook the work of acquiring the land (R. 277).

On or about October 23, 1940, R. Newton McDowell of Kansas City, Missouri, called on Colonel Valliant in Washington, D. C., with reference to the War Department's program to acquire land for the Weldon Springs project through purchase (R. 277). McDowell had previously learned of this program in some manner and had already ascertained that the Kansas City Title and Insurance Company was willing to perform the title work if called upon to do so (R. 88). After conferring with Valliant, McDowell submitted a proposal in the form of a letter dated October 23, 1940, that he, McDowell, be appointed "Optioner" for the Government; that he undertake to acquire options to purchase approximately 18,000 acres of land for the Weldon Springs project within 45 days or such extended period as the United States might require; that he diligently endeavor to obtain the land at the reasonable value thereof; that he obtain the title services of the Kansas City Title and In-

surance Company at his own expense; and that for his services his sole compensation consist "of the five per cent (5%) commission in each purchase, to be paid by the vendor" (R. 231–233). The letter referred to a form of option to be used, under which the vendor would specify the price for which he would sell the land; agree to pay McDowell the 5% commission; agree to grant the Government the right of immediate use and occupancy of the land upon acceptance of the option; and agree to furnish the necessary title papers conveying the land to the United States "free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc." and a certificate of title of the Kansas City Title and Insurance Company (R. 343). McDowell's proposal was accepted by Colonel Valliant acting on behalf of the United States (R. 233).

Within a few weeks McDowell obtained 270 options which he submitted to Colonel Valliant for approval and which were approved by Colonel Valliant on behalf of the United States (R. 280; 693–694). Under the provisions of these option contracts the United States entered into possession of the land early in December of 1940 (R. 98–99, 468, 665). After many of the option contracts had been closed and conveyances made, the United States, having concluded an investigation of the prices which it was paying for land in the Weldon Springs area, determined to repudiate the remaining option contracts on which

no payments had been made and to resort to condemnation (R. 82, 255, 310–313, 694).

In No. 711, a petition in condemnation and a declaration of taking were filed in April of 1941 (R. 4–12). A judgment of condemnation on the declaration of taking was entered April 9, 1941 (R. 13–16). The taking included Tract No. 24/233, consisting of 33.33 acres of land, owned by James Karl Muschany and Vera Muschany. At the time the declaration of taking was filed, $950.00 was deposited as estimated compensation for the land (R. 12–13). On May 17, 1941, the Muschanys filed an answer to the petition in condemnation, in which they alleged that prior to the condemnation proceedings the Government had contracted to purchase the land at a price of $4,500.00, and they prayed that the court dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price (R. 17–20). On April 3, 1942, the United States filed an amended reply to the answer, in which it alleged that the purchase contract was violative of the provision of the Act of July 2, 1940, prohibiting cost-plus-a-percentage-of-cost contracts (R. 21–36).

Substantially the same proceedings were had in No. 726. A declaration of taking and a petition in condemnation were filed April 15, 1941 (R. 479–488). Judgment on the declaration of taking was entered the same day (R. 488–490). The taking included Tract No. 19, containing

94.46 acres of land, which was owned by William M. Andrews and Bertha Andrews. $3,460.00 was deposited as estimated compensation for the land (R. 487). An answer was filed in which as in No. 711 a contract for the purchase of the land was alleged and a judgment sought fixing an award for the land at the contract price, which was $12,000.00 (R. 498–505). In an amended reply to this answer, the United States interposed the same defense as in No. 711 (R. 506–522).

The two cases were tried before Judges Davis and Moore, respectively. The cases were joined, together with another similar case which was being tried before Judge Collet, for trial before the three judges on the issues pertaining to the validity of the purchase contracts (R. 42–336). Each case was tried separately on the issue as to the value of the land (R. 336–448, 543–655). In the case before him Judge Collet held the contract to be invalid as violative of the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940. *United States* v. *94.68 Acres of Land, St. Chas. Co., Mo.*, 45 F. Supp. 1016 (E. D. Mo. 1942). In the two cases here involved the court made findings and conclusions favorable to the condemnees, Judge Moore adopting, so far as applicable, those made by Judge Davis (R. 449–460, 656–657). The Government filed motions for new trials, which were denied (R. 460–466, 657–665). On October 12,

1942, judgment was entered in No. 711 sustaining the validity of the contract, dispensing with the appointment of commissioners, and making an award of $4,500.00 and interest (R. 466–468). A similar judgment was entered in No. 726 on November 5, 1942, the award being fixed at $12,000.00 and interest (R. 663–665). The circuit court of appeals reversed the two judgments, holding the option contracts invalid under the cost-plus-a-percentage-of-cost proviso of the Act of July 2, 1940 (R. 691–704).

DISCUSSION

1. The Act of July 2, 1940, *supra,* pp. 2–3, authorized the Secretary of War, out of the moneys appropriated for national-defense purposes for the fiscal year ending June 30, 1941, to provide facilities and purchase land for the manufacture, etc. of military equipment, munitions, etc. The Act permitted the use of the cost-plus-a-fixed fee method of contracting, but prohibited the use of the cost-plus-a-percentage-of-cost system. The contracts in question provided for the payment by the United States of a "gross sales price," out of which the Government's purchasing agent was to be paid a five per cent commission (R. 233, 343, 493). Therefore, those contracts manifestly contemplated use of the cost-plus-a-percentage-of-cost system of contracting. Furthermore, since, as the court below held (R. 699–700), the record shows that the gross sales prices specified therein

did include five per cent allowances for the Government's purchasing agent, that system of contracting actually was used in these cases. The purpose of Congress in enacting the proviso of the 1940 Act was to proscribe the percentage method of contracting because of its inherent tendency to increase costs to the Government. The record here (see particularly pp. 696–698) amply demonstrated that such was the probable tendency of the contracts here involved. Accordingly, those contracts fell within the ban of the 1940 Act against cost-plus-a-percentage-of-cost contracts.

2. Petitioners also rely (Muschany Pet. 11, 19, 20–21, 31–35; Andrews Pet. 10–11, 12, 14, 21, 25–29) upon the Secretary of War's broad powers under the Act of July 2, 1917, 40 Stat. 241, 50 U. S. C. sec. 171, to pay a price he deems reasonable for land. In view, however, of the proviso of the 1940 Act, the Secretary had no power whatever to buy and pay for land for munition plants out of moneys appropriated for national-defense purposes for the fiscal year ending June 30, 1941, under the cost-plus-a-percentage-of-cost system of contracting. Petitioners also contend (Muschany Pet. 11, 18, 25–27; Andrews Pet. 27) that the prohibition of the 1940 Act against percentage contracts applies only in the case of construction and supply contracts. However, the statute authorizes both construction and supply contracts and land-purchase contracts, and the prohibition

is by its terms applicable to both. Nor is it material, as petitioners contend (Muschany Pet. 25, 31–33; Andrews Pet. 34), that the prices were fair, for "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases." *Weil* v. *Neary*, 278 U. S. 160, 173. Likewise without merit is the contention based on the claim that an official of the United States had full knowledge from the beginning or ratified the contracts after full disclosure of the method of contracting used (Muschany Pet. 14, 18–19, 27–30; Andrews Pet. 11, 22–24, 36). It would be nonetheless true that the contracts were invalid, for "The defence is allowed, not for the sake of the defendant, but of the law itself." *Coppell* v. *Hall*, 7 Wall. 542, 558; *Meguire* v. *Corwine*, 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 268–269; *Embrey* v. *Jemison*, 131 U. S. 336, 349; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151; *McMullen* v. *Hoffman*, 174 U. S. 639, 655, 658; *Cont'l Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, 261–264; *Newman* v. *Moyers*, 253 U. S. 182, 185.

3. *United States* v. *Grace Evangelical Church*, 132 F. 2d 460 (C. C. A. 7), is, as petitioners contend, in conflict with the decision below. However, further proceedings were had in that case in the trial court pursuant to the opinion of the circuit court of appeals, and the United States is prosecuting a second appeal, on which, relying on the inter-

vening decisions of the Eighth Circuit Court of Appeals herein, it will seek reversal of the holding that the option contract there involved was not illegal under the Act of July 2, 1940. Cf. *Lebold* v. *Inland Steel Co.*, 136 F. 2d 876 (C. C. A. 7). The second appeal has been set for oral argument on April 6, 1944. In view of the conflicting decisions of the Seventh and Eighth Circuit Courts of Appeals, the Government does not at this time oppose the granting of the petitions herein but suggests that decision thereon should be postponed pending the outcome of the second appeal in the *Grace Church* case. The problem these cases present is not widespread because, we are informed, this type of contract was not entered ~~infor~~ into for purchase of land in states outside the Sixth, Seventh, and Eighth Circuits (see R. 279, 311–312). Therefore unless the present conflict should persist there would seem to be no reason for review by this Court.

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Nos. 31, 32

In the Supreme Court of the United States

OCTOBER TERM, 1944

JAMES KARL MUSCHANY AND VERA MUSCHANY,
PETITIONERS

v.

UNITED STATES OF AMERICA

WILLIAM L. ANDREWS AND BERTHA L. ANDREWS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

In No. 31 the district court wrote a memorandum opinion (R. 449–460) which is reported in 46 F. Supp. 921. In No. 32 the district court wrote a memorandum opinion (R. 656–657)

which is unreported. The opinion of the circuit court of appeals (R. 690–703) is reported in 139 F. 2d 661.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered December 22, 1943 (R. 703–704). Petitions for rehearing were denied January 14, 1944 (R. 723, 739). The petitions for writs of certiorari were filed February 17, 1944, and February 24, 1944, respectively, and were granted April 3, 1944 (R. 743). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in condemnation proceedings the United States may disaffirm, as contrary to public policy, option contracts for the purchase of land under which five percent of the purchase price was to be paid to the agent of the Government engaged in negotiating for the contracts.

2. Whether the contracts were ratified by the United States.

STATEMENT

These proceedings were brought by the United States to condemn land in St. Charles County, Missouri, as a site for the Weldon Springs ordnance plant. The two cases were joined with a third similar case for trial before the three judges in the district court on the common issue of the

validity of purchase contracts for acquisition of the land. The pertinent facts are the following:

The Act of July 2, 1940, 54 Stat. 712, provided for the more expeditious acquisition of property "out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941." The Military Appropriation Act of September 9, 1940, 54 Stat. 872, made additional appropriations of money for the fiscal year 1941 for national defense purposes.

On October 17, 1940, in a letter to the Secretary of War, the President, under the Act of September 9, 1940, 54 Stat. 872, approved the construction of a TNT and DNT plant at Weldon Springs, Missouri (R. 51, 309). The Secretary of War directed the Quartermaster General of the Army to acquire a site for the plant in St. Charles County, Missouri (R. 52–53). At the direction of the Quartermaster General, Colonel R. D. Valliant, Quartermaster Corps, then in charge of the Real Estate Branch of the War Department, undertook the work of acquiring the land (R. 277).

On or about October 23, 1940, R. Newton McDowell of Kansas City, Missouri, called on Colonel Valliant in Washington, D. C., with reference to the War Department's program to acquire land for the Weldon Springs project through purchase (R. 277). McDowell had previously learned of this program and had already ascertained that the Kansas City Title and Insurance Company was

willing to perform the title work if called upon to do so (R. 88). After conferring with Valliant, McDowell submitted a proposal in the form of a letter dated October 23, 1940, that he, McDowell, be appointed "Optioner" for the Government; that he undertake to acquire options to purchase approximately 18,000 acres of land for the Weldon Springs project within 45 days or such extended period as the United States might require; that he diligently endeavor to obtain the land at the reasonable value thereof; that he obtain the title services of the Kansas City Title and Insurance Company at his own expense; and that for his services his sole compensation consist "of the five per cent (5%) commission in each purchase, to be paid by the vendor" (R. 231–233). The letter referred to a form of option to be used, under which the vendor would specify the price for which he would sell the land; agree to pay McDowell the 5% commission; agree to grant the Government the right of immediate use and occupancy of the land upon acceptance of the option; and agree to furnish the necessary title papers conveying the land to the United States "free and clear of all taxes, liens and encumbrances of every kind and character, including stamps, taxes and etc." and a certificate of title of the Kansas City Title and Insurance Company (R. 342–344). McDowell's proposal was accepted by Colonel Valliant acting on behalf of the United States (R. 233).

Thereupon McDowell went into the field and took up the work of obtaining the options. He called a meeting of the landowners in the area to be acquired, which was held on November 6, 1940, and was attended by many of the landowners, their attorneys, and interested persons. At this meeting he outlined to the landowners the method through which the Government would seek to purchase their property. (R. 109, 115, 141.) He announced that he had authority to ascertain from the landowners what they wanted for their property and to add to that sum his 5% commission and the title company's 1½% commission. He told the meeting that the Government would pay not only the value of the property, but also the commissions. (R. 62–65, 108–109, 115, 118, 140–141, 190, 199–202.) With reference to this meeting George H. Williams, former United States Senator from Missouri, testified (R. 108):

> Mr. McDowell spoke maybe two or three times. He was questioned by me and by Mr. Willson, and I think by Mr. Ford Thompson, as to his statement that he intended to include his commission in the purchase price, and his statement that such was his intention. I told him, in the presence of this crowd, that I didn't think I had ever seen a person who needed a criminal lawyer more than he—
>
> * * * * *
>
> And I urged the people present to beware of any such situation, and to be sure not to

> sign a contract like that, because if they did they would become involved with Mr. McDowell in a conspiracy to defraud the Government and I hoped that no person present would make such a contract.

An account of the meeting was carried the next day in the local newspapers (R. 192). Subsequent to the meeting and after conferences with McDowell, the Landowners' Committee announced in their circular (R. 236) that the United States would pay not only "the fair, current, market value of the land" but also "the legal costs and the commission to the War Department's Agent."

When McDowell sought to agree with the landowners upon the option prices, they followed the procedure outlined at the meeting and mentioned in the circular of the Landowners' Committee, i. e., they agreed upon the value of the property, and added to that the commissions, recorder's fees, and documentary and stamp taxes (R. 127–131, 140–141, 150, 163, 167–168, 173, 186–188, 196–197; and price breakdowns at R. 268–274, 328–332).

Within a few weeks McDowell obtained 270 options, which he submitted to Colonel Valliant for approval, and which were approved by Valliant on behalf of the United States (R. 280; 693–694). Under the provisions of these option contracts the United States entered into possession of the land early in December 1940 (R. 98–99, 468, 665). After many of the option contracts had been closed and conveyances made, the United States, having concluded an investigation of the

prices which it was paying for land in the Weldon Springs area, determined to repudiate the remaining option contracts on which no payments had been made and to resort to condemnation (R. 82, 255, 310–313, 694). This determination was thus described by the Under Secretary of War in a telegram to McDowell, dated March 18, 1941 (R. 255–256):

> Reurtel March 11 To Harry Hopkins Relative To Weldon Springs TNT Plant Near St. Louis Serious Questions Which Have Arisen Concerning This Project Including Lack Of Appraisals And Excessive Prices Resulting In Widespread Criticism Of War Dept. Require That Matter Of Payments Be Submitted For Consideration Of Federal Court Authorities This Policy Adopted Only After Exhaustive And Careful Consideration Your Refusal To Accept Proposed Reduction In Amount Of Commission In No Way Influenced Determination Of Policy To Resort To Condemnation Proceedings Estimated Compensation To Owners Will Be Deposited In Court Within Few Days And Immediate Partial Distribution Can Be Made In Discretion Of Judge The War Dept. Will Welcome Any Offer On Your Part To Cooperate On Re-Negotiation Of Options At Prices Which Will Warrant Closings On Acquisitions By Direct Purchase And Will Consider Any Offer From Owners Prior To Conclusion Of Condemnation Proceedings.
>
> Patterson Under Secy of War Wash DC.

In No. 31, a petition in condemnation and a declaration of taking were filed in April 1941 (R. 4–12). A judgment of condemnation on the declaration of taking was entered April 9, 1941 (R. 13–16). The taking included Tract No. 24/233, consisting of 33.33 acres of land, owned by James Karl Muschany and Vera Muschany. They had purchased the land in 1939 for $1,000 (R. 347, 355.) At the time the declaration of taking was filed, $950.00 was deposited as estimated compensation for the land (R. 12–13). On May 17, 1941, the Muschanys filed an answer to the petition in condemnation, in which they alleged that prior to the condemnation proceedings the Government had contracted to purchase the land at a price of $4,500.00, and they prayed that the court dispense with the appointment of commissioners and at once enter judgment fixing an award for the land at the contract price (R. 17–20). On April 3, 1942, the United States filed an amended reply to the answer, in which it alleged that the purchase contract was violative of public policy and various statutory provisions (R. 21–36).

Substantially the same proceedings were had in No. 32. A declaration of taking and a petition in condemnation were filed April 15, 1941 (R. 479–488). Judgment on the declaration of taking was entered the same day (R. 488–490). The taking included Tract No. 19, containing 94.46

acres of land, which was owned by William M. Andrews and Bertha Andrews. They had purchased it in 1934 for $1,750 and had expended possibly $500 for improvements. (R. 569, 572, 606.) $3,460.00 was deposited as estimated compensation for the land (R. 487). An answer was filed in which as in No. 31 a contract for the purchase of the land was alleged and a judgment sought fixing an award for the land at the contract price, which was $12,000.00 (R. 498–505). In an amended reply to this answer, the United States interposed the same defense as in No. 31 (R. 506–522).

Each case was tried separately on the issue as to the value of the land (R. 336–448, 543–655). In the case before him Judge Collet held the contract to be invalid as violative of the prohibition against cost-plus-a-percentage-of-cost contracts contained in the Act of July 2, 1940. *United States* v. *94.68 Acres of Land, St. Chas. Co., Mo.*, 45 F. Supp. 1016 (E. D. Mo. 1942). In the two cases here involved the court made findings and conclusions favorable to the condemnees, Judge Moore adopting, so far as applicable, those made by Judge Davis (R. 449–460, 656–657). The Government filed motions for new trials, which were denied (R. 460–466, 657–662, 665). On October 12, 1942, judgment was entered in No. 31 sustaining the validity of the contract, dispensing with the appointment of commissioners, and

making an award of $4,500.00 and interest (R. 466–468). A similar judgment was entered in No. 32 on November 5, 1942, the award being fixed at $12,000.00 and interest (R. 663–665). The circuit court of appeals reversed the two judgments, holding the option contracts invalid under the cost-plus-a-percentage-of-cost proviso of the Act of July 2, 1940 (R. 691–704).

SUMMARY OF ARGUMENT

1. The United States is not precluded from seeking a determination of just compensation for the taking of petitioners' lands because of the prices fixed in contracts of purchase under which the Government's purchasing agent was to receive five percent of the prices agreed upon. The conflict between the agent's self-interest and his duty to the Government was such that the United States is entitled to avoid the contracts. Cf. *Crocker* v. *United States*, 240 U. S. 74. The power of avoidance is not affected by the fact that the contracts were formally approved by an officer of the War Department. In reality that officer acted upon the recommendations of the purchasing agent without any independent means of investigating the prices. Cf. *United States* v. *Carter*, 217 U. S. 286, 299. Whether or not the prices arrived at by the landowners and the agent in the present cases are excessive, the power to disaffirm exists, for what is aimed at is the tendency to evil in arrangements of this kind. Numer-

ous federal statutes reflect the principle that agents of the United States are not to be given a pecuniary interest adverse to their duty to the Government.

In addition, the contracts violate the rule frequently applied by this Court, that contingent fees for the procurement of Government contracts are contrary to public policy. Thus, if petitioners' view of the transactions is accepted, that the contingent fee was to be paid by the vendors and not added to the price otherwise agreed upon as the value of the land, the arrangement cannot be defended. If, on the other hand, the view of the circuit court of appeals is accepted, that the evidence shows the commission was an additional amount included in the price payable by the Government, petitioners stand in no better case. The effect is that the Government would be called upon to pay both the probably inflated base price and also the commission itself. The standard Government procurement contracts are required to contain a warranty against the employment of contingent fee brokers; the agent here could not bring himself within any exception in such warranties, for he was not in any event engaged in an established brokerage business.

The court below held the contracts illegal under the statutory prohibition against the use of the cost-plus-a-percentage-of-cost system of contracting. It is believed that the contracts are voidable

even apart from this prohibition. They do, however, incorporate the very evil against which the prohibition is directed, that is, the addition of an incentive to inflate costs to the Government through the offer of a percentage of the base price, which is left to be determined in large part by those having an interest in increasing the cost. Recent statutory provisions limiting commissions on land purchase contracts to two percent of the purchase price do not authorize the payment of percentage commissions. Those provisions merely set a limit on the amount of fixed commissions which may be awarded.

2. The contracts were not ratified by the United States. In retaining possession of the land the Government indicated that the taking was ratified, and hence the Government was obligated to pay just compensation, cf. *United States* v. *North American Co.*, 253 U. S. 330; but the contracts themselves were plainly disaffirmed, and in fact the condemnation proceedings were brought within about four months of the original taking of possession. The Government stands ready to pay compensation for the value of the lands as of the date of the original taking, plus interest on that amount to the date when the estimated compensation was paid into court, and interest on any deficiency from the latter date to the date of payment.

I

ARGUMENT

The land purchase contracts were contrary to public policy and therefore the prices fixed therein are not binding in condemnation proceedings

1. *The antagonistic interests of the Government's purchasing agent.*—The precise issue in these cases is whether the Government is precluded from seeking a determination of just compensation for the taking of petitioners' land because of prices stipulated in contracts of purchase under which the Government's purchasing agent who negotiated the prices was to receive as a commission 5 percent of the prices agreed upon.[1] The judges of the court below held unanimously that the contracts were not binding upon the United States. The same conclusion was reached by Judge Collet in a companion case, 45 F. Supp. 1016 (E. D. Mo.), and by Judge Evans, dissenting, in *United States* v. *Grace Evangelical Church,* 132 F. (2d) 460, 462–463 (C. C. A. 7). The fundamental vice in the contracts, which in our view entitles the United States to avoid them, is the obvious

[1] Since the contracts provided that the prices agreed upon would determine the amount of the award in the event of condemnation (R. 344, 556), we concede that under *Danforth* v. *United States*, 308 U. S. 271, the prices would be binding if the contracts themselves were not avoidable. In this respect the contracts differ from that involved in *United States* v. *Two Acres of Land, etc., and Grace Evangelical Church*, pending on petition for certiorari, No. 456, present Term.

conflict which was established by the commission feature between the self-interest of the Government's agent and his duty to serve the interest of his principal, the United States. Whether his commission, increasing proportionately with the prices paid by the Government, was to be met by the vendors or by the United States does not affect the essential infirmity in the contracts, though it may perhaps affect the applicability of one or another of various statutory prohibitions and penalties. The incentive to negotiate for excessive prices exists whether the land owners were to pay 5 percent of the inflated value or were to have included in their remittances from the Government an additional 5 percent to be distributed to the Government's agent.

This essential vice in the contracts was succinctly described by Judge Evans, *supra,* 132 F. (2d) at p. 463, in discussing a similar arrangement for the purchase of land in another area:

> Sound reason and common sense, alike, condemn this contract as violative of sound public policy. Instead of protecting the public (the Government and the taxpayers), it furnished incentive for raids upon the Treasury.
>
> Herman was financially benefited by higher, not lower, purchase prices. Under the circumstances, the vendor was, of course, willing to pay a commission to the buyer's representative, for both were in-

> terested in boosting the price. But who was there to protect the U. S. Government?
>
> This is not like an agency contract between seller and a real estate agent where parties knew the agent was to receive a commission from the purchaser. Here, the agent had no limitation as to price. There was no one to check his price negotiations. There could be no ratification, in fact, no knowledge, of his loading the selling price to the financial advantage of himself and of the seller.

The responsible officers of the War Department itself came to a prompt realization that the contracts were indefensible. The telegram sent by the Under Secretary of War to McDowell, the Government's agent, has already been set forth (p. 7, *supra*). The Under Secretary had occasion to testify before a committee of the House of Representatives in April, 1941. At that time he stated (Hearings before Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, p. 80):

> Sites for cantonments, if not publicly owned, are generally acquired through land acquisition agencies of other Departments. In acquisitions for munitions plants, the practice at first was to retain the services of a real estate agent in the State where the land was located, on a commission basis,

> generally at 5 percent of the purchase price. That practice was not sound. The commissions were too high, and the use of any percentage system is open to the objection that the agent's financial interest is in favor of high prices. In December 1940 the practice was changed. The real estate branch has been directed to employ the Soil Conservation Service of the Department of Agriculture wherever practicable, and in other cases to retain real estate agents for a fixed fee. More recently we have reorganized the real estate branch. We have also reviewed earlier acquisitions which had been carried out on the percentage commission basis.

He proceeded to characterize the system of commissions to brokers employed by the Government for land acquisition as "a system that I will not defend." (*idem*, p. 106).

It requires no elaborate discussion to establish the conclusion that a conflict of interest such as that exhibited here entitles the United States to disaffirm the resulting contracts. Thus, in *Crocker* v. *United States*, 240 U. S. 74, the United States was held not liable on contracts made in its name for the purchase of articles where the agent of the United States actively engaged in the transactions had agreed to share commissions with an agent of the vendor; and this result was reached even though the vendor itself had not authorized and indeed was not aware of the arrangement. The governing principle in such cases, as in the

case of fiduciaries generally, was stated pithily in *Marsh* v. *Whitmore*, 21 Wall. 178, 183–184:

> Their union in the same person would at once raise a conflict between interest and duty, and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle.

As the *Crocker* case, *supra*, makes clear, it is not only the illicit profit or commission which may be disavowed or recovered by the principal; the right to disaffirm extends to the natural fruits of the illicit arrangement and thus entitles the United States to avoid the contract made with petitioners. "The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it." *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 566.

It is no answer to suggest that the contracts were approved by an officer of the War Department after submission by McDowell. This fact could not cure the inherent vice in the system. The realities of the system when examined make plain, moreover, the vital character of McDowell's part in the transactions. It was he who represented the Government on the spot, setting up his own organization for the purpose of dealing with land owners. The negotiations were entrusted to his charge. What he submitted for approval was the merest summary of each proposed purchase, consisting of the name of the owner, the number of acres involved, and the price agreed upon in an

option contract negotiated by him and recommended by him for approval. Colonel Valliant, who gave formal approval, testified frankly to the procedure followed (R. 276–308).

The prices recommended by McDowell were not checked by any appraisals or first-hand investigation of the particular tracts; or record of sales in the area; at most, the prices were subject to comparison one with another on the basis of the bare recommendations of McDowell (R. 277, 281, 283, 305, 311). In only one instance was a price so recommended disapproved, and in that instance McDowell's recommendation was for a price of $10,000 notwithstanding the fact that earlier he had recommended approval of a price for the same property of $4,500 (R. 280–281). In these circumstances the critical nature of McDowell's negotiations is readily evident. *United States* v. *Carter*, 217 U. S. 286, presented a similar situation with respect to administrative approval of contracts tainted with a conflict of interest on the part of the Government's agent. There it appeared that a captain in the Army, having responsible functions with respect to construction contracts, had agreed to share to the extent of one-third in the profits of a certain partnership performing work for the Government. The Court said, discussing the relevance of approval of the contract by superior officers (p. 299): "It is undoubtedly true that the plans, the form of con-

tracts, the character and time of advertising, and acceptance of bids, as well as most matters involving the exercise of judgment and discretion during the execution of contracts, were reported to the War Department for its approval or rejection. Nevertheless it is most thoroughly made out that the action and recommendation of a local engineer officer in charge of such work practically determined the situation so long as he had the confidence of his superiors and kept within the general limits of the appropriation by Congress for the work in hand."

As the court below pointed out, it is unnecessary to consider whether in the particular contracts involved in these two cases the Government obligated itself to pay sums which were in fact excessive. The obvious conflict between the interest of the Government and that of its agent entitles the United States to avoid the contracts if in its judgment it is advisable to do so to safeguard the public interest. If this were not so the power to disaffirm would be lodged not in the party whose interests have been put in jeopardy but in a court or jury upon the basis of their own appraisal of loss in particular cases. Once the arrangement is shown to be inconsistent with sound public policy the power to avoid it is given absolutely. Thus, the disqualification of a trustee to purchase trust property, and the right of a beneficiary to disaffirm, do not depend on a showing

of loss in a particular case. "In this conflict of interest, the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty." *United States* v. *Carter,* 217 U. S. 286, 308–309, quoting from *Michoud* v. *Girod,* 4 How. 503, 555.

While it is unnecessary to consider the extent to which the purchase prices may have been inflated in the cases now before the Court, it may be appropriate to observe that the dual interest of McDowell, obvious enough on its face, was not without effect. McDowell generally accepted the owners' asking prices (R. 66–67, 140–141, 150, 163, 167–168, 196). The court below recounted certain illustrative transactions disclosed by the record, showing the dictates of self-interest in operation. The recommendation of an offer to sell for $10,000 after recommending a price of $4,500 for the same property was in fact followed by a third recommendation that a value of $4,800 in the event of condemnation would be a fair appraisal for the land (R. 264–267). Another landowner was told by an agent of McDowell that the latter would himself like to add $50 an acre to the owner's asking price, but the owner declined to adopt the suggestion (R. 197). Prices recommended and accepted included substantial sums for loss in salary of

partners, loss of business and of inventory, drainage taxes, and the like (R. 171, 172–173, 179, 267, 325–328).

The power of the United States to disaffirm the contracts need not depend on statutory prohibitions. Like the policy against contingent fees for the procurement of Government contracts (*Hazelton* v. *Sheckells*, 202 U. S. 71) the policy against making public contracts a source of private profit to the Government agents who negotiate them is a rule which "does not depend on reasoning technical in its character, and is not local in its application. It is based upon principles of reason, of morality, and of public policy. It has its foundation in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails." 2 Dillon, *Municipal Corporations* (5th ed. 1911), p. 1140. Judge Lurton, in *City of Findlay* v. *Pertz*, 66 Fed. 427, 435 (C. C. A. 6), said:

> * * * We know of no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public policy unite in condemning such

contracts, and no court will tolerate any suit for their enforcement.

Buttressing this well-recognized policy, the federal statutes are replete with provisions which proscribe, and frequently impose penalties for, transactions in which agents of the United States are given a pecuniary interest adverse to their duty to the Government. Thus, Section 113 of the Criminal Code (18 U. S. C., sec. 203) makes it a criminal offense for an "officer or clerk in the employ of the United States" to "receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, * * * or other matter or thing in which the United States is a party or directly or indirectly interested, before any department * * *." This statute had its origin in the Act of June 11, 1864, c. 119, 13

[2] Cf. Dillon, *supra*, at pp. 1142–1143:

"The principles of the common law and of equity are generally supplemented and made more emphatic *by statutory enactments* prohibiting any municipal officer from being *interested directly or indirectly in any municipal contract* or in the rendition of services for the municipality outside of those required from him by virtue of his office. The statutes usually make a violation of their provisions a criminal offence entailing a forfeiture of office as well as punishment by fine or imprisonment, and they frequently declare that all contracts entered into in violation of their provisions shall be void. Such statutes are declaratory of and in aid of the principles of the common law, though, as we shall see, some difference in the resulting consequences of the illegality appea. ; in the decisions." [Italics in original.]

Stat. 123. A similar statute, likewise stemming from wartime experience, is Section 112 of the Criminal Code (18 U. S. C., sec. 202) derived from the Act of July 16, 1862, c. 180, 12 Stat. 577. This provision makes it an offense for any "officer or agent of the United States" to receive or agree to receive from any person any money or other valuable consideration for "procuring, or aiding to procure, any contract * * * from the United States or from any officer or department thereof * * *." Included in this statute is the provision that "Any such contract or agreement may, at the option of the President, be declared void." The legislative history makes it clear that the latter provision was regarded as declaratory of the "common principle" governing the effect of such a prohibition, and the reference to the President was intended to give the power of avoidance to the Executive as distinguished from the Legislative branch.[1] The Act of March 3, 1917,

[1] See Congressional Globe, 37th Cong., 2d sess., p. 2958. In response to a suggestion that the phrase "at the option of the authority of the United States making the same" be adopted, Senator Fessenden replied: "'Option of the President of the United States' would be better; otherwise it might be construed to require an act of Congress." Power thus vested in the President has frequently been construed to mean authority exercised through the appropriate department heads. E. g., *Wilcox* v. *McConnel*, 13 Pet. 498, 512; *French* v. *Weeks*, 259 U. S. 326.

The prevailing attitude toward the 1862 legislation is reflected in the statement of Senator Bingham (Congressional Globe, 37th Cong., 2d sess., p. 3261): "There may be some confusion in the language, but on looking at the bill the gen-

c. 163, 39 Stat. 1106 (5 U. S. C., sec. 66), makes it an offense for any "Government official or employee" to receive any salary in connection with his services except from the federal Government or the government of a state, county or municipality, and makes it an offense for any person to contribute to or in any way supplement the salary of any Government official or employee for the services performed by him for the United States. Section 41 of the Criminal Code (18 U. S. C., sec. 93), derived from the Act of March 2, 1863, c. 67, 12 Stat. 698, makes it an offense for an officer or agent of any corporation or association, or any member or agent of a firm, or any "person directly or indirectly interested in the pecuniary profits or contracts of such corporation," association or firm, to be employed or to act "as an officer or agent of the United States for the transaction of business with" such corporation, association or firm.[4]

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tleman will find that, so far as officials are concerned, it is as comprehensive now as the wit of man can make it." Nevertheless, at the succeeding session of Congress the legislation was extended to include "agents" of the Government. Congressional Globe, 37th Cong., 3d sess., pp. 1018, 1175.

[4] Charles E. Hughes, in his report and recommendations on aircraft production, rendered on October 25, 1918, stated:

"3. The absence of proper appreciation of the obvious impropriety of transactions by Government officers and agents with firms or corporations in which they are interested compels the conclusion that public policy demands that the

The scope and importance of the policy thus reflected in Congressional legislation have frequently been emphasized in opinions of the Attorneys General. Thus, in 33 Op. A. G. 273, 275, it was said: "The object of the provision in the Act of March 3, 1917 (ch. 163), was that no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States." And in 40 Op. A. G., No. 42, dated March 31, 1942, in response to an inquiry whether officers of certain companies might be employed to advise the Signal Corps on facilities, personnel, and the like, available in those companies, it was stated, after referring to 18 U. S. C., sec. 93 and 5 U. S. C., sec. 66: "The purposes of the two statutes quoted are similar. Both are intended to prevent a conflict between self interest and the interests of the Government. A man whose duty it is to serve the public weal as a Government servant should not be put into a position where he can also serve his selfish interests. The law has long recognized this fundamental problem. *Michoud* v. *Girod,* 4 How. 503, 555; *United States* v. *Carter,* 217 U. S. 286,

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statutory provisions bearing upon this conduct should be strictly enforced. It is therefore recommended that the officers found to have had transactions on behalf of the Government with corporations in the pecuniary profits of which they had an interest should be prosecuted uinder section 41 of the Criminal Code." (57 Cong. Rec. 883, 914.)

306."[5] As the court below pointed out, there is no indication that the legal advice of the Attorney General was sought prior to the arrangements entered into for the acquisition of the land here involved.[6]

2. *The payment of a contingent fee by the vendors for the procurement of the contracts of sale.*—Even if we disregard the dual and conflicting interests of McDowell, the contracts may be avoided by the United States because of the feature whereby the vendors agreed to pay to him a commission contingent upon the execution of the contracts with the United States and directly proportionate to the price obtained. It has long been recognized by this Court that contingent fees for the procurement of Government contracts are contrary to public policy, their tendency being to increase costs to the public and to result in the award of Government contracts as a consequence of illegitimate considerations. *Tool Company* v.

[5] Cf. Landis, *Statutes and the Sources of Law*, in *Harvard Legal Essays* (1934) 213, 222: "A course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts." This may be true even where, as is not the case here, the legislation marks a departure in policy. See *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391 note 4.

[6] Compare the expression of disbelief by a former United States Senator when McDowell stated at a public meeting that the arrangements had the approval of the Attorney General (R. 106). Another lawyer, "rather amused" by McDowell's statement of the arrangement (R. 204), told the meeting that he was "greatly surprised that the Government would ever consent to such a thing" (R. 203).

Norris, 2 Wall. 45, 54–56; *Oscanyan* v. *Arms Company,* 103 U. S. 261, 271–273; *Hazelton* v. *Sheckells,* 202 U. S. 71, 79; *Crocker* v. *United States,* 240 U. S. 74, 78–79; cf. *American Seating Company* v. *Zell,* No. 613, 1943 Term, decided May 8, 1944. Petitioners argue strenuously that their actual agreements with McDowell were as the face of the contracts indicated, namely, that the commissions to him were to be paid by them as vendors, and were not to be paid by the Government as an addition to the value of the land. The district court found (R. 451, 656) that with respect to the options in the two cases here involved there is no evidence that the option price included the amount which the defendants asked for the land plus McDowell's fee of 5 percent of the sales price. The court did find, however, that (R. 452):

> The plan carried out by the Government contemplated that the price for which options would be taken should not only include the value of the land, but also the fee of the Government's soliciting agent, the fee of the title examiner, the cost of revenue stamps, the fee for recording the conveyances, and other incidental expenses.

The circuit court of appeals held that the evidence as a whole clearly showed an understanding on the part of the landowners and McDowell (R. 62–65, 108–109, 115, 118, 140–141, 190, 192, 199–202, 236) as well as Colonel Valliant (R. 298–299) that the commissions were to be added to the

agreed value of the land, and that this was the practice generally followed in fixing option prices (R. 127–131, 140–141, 150, 163, 167–168, 173, 186–188, 196, 268–274, 328–332).

If petitioners' view of the commission payments were to be accepted, the transactions would run afoul of the policy against the payment of contingent fees for the procuring of Government contracts. The principle long ago recognized in the decisions of this Court was embodied beginning in 1918 in a standard form of warranty clause in Government procurement contracts.[7] See 10 Code of Federal Regulations (Cum. Supp. 1943) Section 81.323. If it is of any significance in this connection that the contingent fee was to be paid to a person designated to represent the interests of the Government, that circumstance only serves to aggravate the evil, since it removes one check

[7] The origin and evolution of this clause are described in a memorandum filed as an exhibit in Hearings before the Committee on Naval Affairs, House of Representatives, 78th Cong., 1st sess., on Investigation of the Progress of the War Effort, pp. 380–385. See also H. Rep. No. 353, 78th Cong., 1st sess., pp. 5–6. The warranty clause provides that it "shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." McDowell would not qualify under any construction of the exemption. He was not even a professional or established real estate broker, but was in the construction business (R. 212, 250, 693, n. 4). Though present at the trial, McDowell did not testify (cf. R. 259).

which might otherwise exist against the self-interest of the contingent-fee procurement agent.

If we accept the view of the transactions taken by the circuit court of appeals, which we believe to be clearly supported by the evidence, to the effect that the commissions were in fact included within the price payable by the United States as an addition to the net agreed-upon value of the land, petitioners stand in no better case. Payment by the Government of the contingent fee for which the vendors were formally liable by contract simply enhances the inflationary effect on the cost to the United States. A somewhat comparable situation is presented in the use of contingent fees by sub-contractors in procuring work under principal contracts with the Government where the latter contracts are on a cost-plus-fixed-fee basis. It has been recognized that the use of contingent fees in the procurement of sub-contracts in these circumstances is an evil which should be met no less than where the device is used in contracts directly with the Government, for in effect the Government would be called upon to pay as costs the possibly inflated expenses attributable to the sub-contracts and also the commission itself. Accordingly, by Executive Order contingent fees in sub-contracting which are unrelated to the services performed or where the only service performed is the obtaining of the order, are not to be permitted. See Executive

Order 9001, 6 Fed. Reg. 6787; 10 Code of Federal Regulations (Cum. Supp. 1943) Section 81.1181; cf. *American Seating Company* v. *Zell, supra.*[5] The problem of sub-contracts, of course, goes beyond the necessities of the present case; it is referred to here only to indicate that if the commission agreed to be paid by the vendors was in fact paid by the United States, as we think it was, the arrangement is none the less in conflict with the policy against burdening the United States with costs and inflated prices attributable to the contingent fee device.

3. *Cost-plus-a-percentage-of-cost feature.*—The circuit court of appeals, in sustaining the Government's right to condemn without regard to the prices fixed in the contracts, held the contracts to be in violation of the proviso in Section 1 of the Act of July 2, 1940, 54 Stat. 712, which states that "the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract

[5] By an amendment to the Renegotiation Act, Act of February 25, 1944, Public Law 235, 78th Cong., 2d sess., sec. 701 (b), sub-contracts, as defined for the purpose of renegotiation, are stated to include contracts under which any amount is payable contingent upon the procurement of a contract or sub-contract or determined with reference to the amount of such a contract or sub-contract, or under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a department, or a sub-contract or sub-contracts.

when such use is deemed necessary by the Secretary of War."* The purchase of land for the Weldon Springs project was undertaken pursuant to the authority contained in that Act, whereby the Secretary of War was authorized to provide for the necessary construction of "plants * * * (including Government-owned facilities at privately owned plants and the expansion of such plants, and acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; * * *." While the appropriation Act of June 26, 1940, 54 Stat. 601, 602, was referred to in the declarations of taking (R. 11, 485), and the supplemental appropriation Act of September 9, 1940, 54 Stat. 872, 873, in the President's authorization of the project (R. 51), both Acts are subject to the provisions of the Act of July 2, 1940, which relate to the use of "moneys appropriated for the War Department for national-defense pur-

*The proviso of this section has been continued in effect and made applicable to moneys appropriated to the War Department for war purposes. Act of June 30, 1941, sec. 9, 55 Stat. 393, and Act of June 5, 1942, sec. 13, 56 Stat. 317, 50 U. S. C. App. (Supp. III), sec. 773. The settled policy of Congress to outlaw cost-plus-a-percentage contracts is also shown by other statutes in which similar provisos appear. Act of June 28, 1940, sec. 2 (a), 54 Stat. 676, 677; Act of May 2, 1941, sec. 2 (c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 839.

poses for the fiscal year ending June 30, 1941 * * *."

We believe that the contracts in question may be disaffirmed independently of the Act of July 2, 1940. That Act is an additional embodiment of the principle which outlaws the furnishing of incentives to increase the financial burden of Government contracts. The Act recognizes that the cost-plus-a-percentage-of-cost system of contracting is subject to an inflationary tendency notwithstanding the theoretical safeguard of supervised cost accounting. The present contracts are in substance cost-plus-a-percentage-of-cost contracts for the "acquisition of * * * land," subject to the same inherent tendency toward increased prices by virtue of the added incentive to enhance the prices demanded of the Government.[10] Petitioners in No. 32 (Brief, pp. 40–41), while denying the applicability of this statutory prohibition, concede that if the Government had agreed that McDowell might purchase the land from the owners and resell it to the Government at cost to him plus a 5-percent commission, the transaction would plainly be covered. In the present cases the evil is even more pronounced, for McDowell

[10] The legislative history of the Act casts no light on the intended scope of the prohibition. As it passed the Senate, the bill prohibited the cost-plus system; in conference this was changed to the cost-plus-a-percentage-of-cost system. H. Rep. 2578, 76th Cong., 3d sess., p. 6; H. Rep. 2685, *id.*, p. 6; 86 Cong. Rec. 7839, 7841, 7843.

was not obliged to take any risk of purchase on his own part. Petitioners contend also that the contracts in question are cost-plus-a-fixed-fee contracts, since at the time of acceptance by the United States the prices as well as McDowell's commission were definitely fixed. Likewise, the district court regarded the vice of the cost-plus-a-percentage-of-cost system to be the uncertainty in the amount of the base price and particularly of the commission. But it is clear that the vice does not lie primarily in the uncertainty of the amount; it rests in the inherent tendency of the system to cause padding of prices. That the present contracts and the more typical cost-plus-a-percentage-of-cost contracts, as in the shipbuilding industry, are fraught with the same evil, was recognized by Judge Collet. *United States* v. *94.68 Acres of land, St. Chas. Co., Mo.*, 45 F. Supp. 1016, 1019–1020. He pointed out that the essential similarity lies in the likelihood of swelling of the costs when the proposed bills are presented to the United States, in the one case through the padding of expense items and in the other through the inclusion of questionable amounts in the negotiated price.

Petitioners in No. 32 have pointed out that Congress has recently provided in Section 12 of the Military Appropriation Act of 1944, 57 Stat. 347, that no part of the money appropriated thereunder "shall be expended for the payment of any commission on any land purchase contract in excess of 2

per centum of the purchase price" (Brief, p. 17). But the legislative history shows that this provision does not authorize the payment of commissions to purchasing agents adjustable according to the purchase price. On the contrary, the provision merely limits the absolute amount of any commission which may be paid by the United States in connection with land contracts. The provision appears to have originated in the Naval Appropriation Act of 1942, 55 Stat. 151, 177. It was modeled upon a provision limiting the fees payable to outside engineers and architects to 6 percent, and under that provision it is understood that the fees are to be fixed in amount, the designated percentage constituting a ceiling for the fixed amount. See Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Navy Department Appropriation Bill for 1942, pp. 502–504, 505–509; Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, pp. 46–50, 53.[11] Percentage commissions for the acquisition of land have not been authorized.

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[11] General Somervell, testifying with respect to the precedent of the limitation on engineers' fees, stated:

"That is, we give him a certain sum of money. He does not know anything about the percentage. We offer him

II

The contracts were not ratified by the United States

It is contended by the petitioners that the United States ratified the contracts by virtue of the fact that the War Department remained in possession of the land after investigating the cir-

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$100,000, $50,000, or $200,000 for doing the job, and he waives all claims on account of extras when he signs the contract. So if it costs twice that much, he gets nothing more." (Senate Hearings, *supra*, p. 49.)

Similarly, Under Secretary Patterson testified:

"He gets a fixed fee, in a sum of money, which is calculated generally as a certain percentage of estimated cost; but it remains constant once determined, whatever the actual cost, and unless the plant is a different plant from the one originally contemplated, he is held down to his original fee" (*id.* p. 31).

The Committee reports and debates do not cast additional light on the matter. The 2 percent limitation in the Naval Appropriation Act of 1942 was recommended by the conference committee after the Senate had passed a 3 percent limitation. See S. Rep. No. 116, 77th Cong., 1st sess., p. 4; H. Rep. No. 454, 77th Cong., 1st sess., p. 4; 87 Cong. Rec. 2432, 3404–3408.

Analogous limitations found in federal statutes are collected in Hensel and McClung, *Profit Limitation Controls Prior to the Present War* in *Law and Contemporary Problems*, Autumn 1943, 187, 212, note 141. These are all limitations on fixed fees.

The distinction between these fixed fees with a maximum limit and percentage-of-cost fees which provide incentive for cost increases, as in the present case, is set forth in the opinions of the Judge Advocate General cited in Pet. Brief in No. 32, pp. 36–38 (Bulletin, J. A. G., July 1943, p. 278; *id.*, Dec. 1943, p. 483). The Comptroller General has quoted with approval from Judge Collet's opinion, *supra*, p. 33. 22 Dec. Comp. Gen. 784.

cumstances surrounding the contracts. The retention of possession was, of course, continuous during the period of about 4 months between taking possession and the bringing of condemnation proceedings, and it has continued thereafter. But if anything was thereby ratified, it was the taking and not the contracts. The Secretary of War had authority, which we do not understand to be disputed, to take the property in question for purposes of an ordnance plant. Having this authority, he was in a position to take the property with or without a contract or condemnation, with the consequence that the United States would be obligated on an implied promise to pay just compensation. This is made clear by one of the cases cited by petitioners (Brief in No. 31, p. 26), *United States* v. *North American Company,* 253 U. S. 330. There it was held that since Congress had authorized a taking by the Secretary of War, he could ratify the taking of possession by subordinates and thus obligate the Government to pay compensation. In the present case, so far as the contracts are concerned, nothing could be plainer than that the responsible officers of the War Department disaffirmed them. This is clear both from the action of the War Department in withholding payments, as explained in the telegram of Under Secretary Patterson (R. 255–256), and from the action of the Secretary of War in authorizing and directing the filing of a declaration of taking in condemnation (R. 10–12).

What has been said with reference to ratification has assumed that the contracts might have been affirmed by the War Department. This possibility would probably have existed if the contracts were deemed contrary to public policy or the fruit of agreements prohibited by statute, since in such cases the party for whose benefit the statutory protection is given has the privilege of electing to affirm or disaffirm. If, however, the contracts are regarded as in violation of the cost-plus-a-percentage-of-cost provision, which is a direct prohibition of such contracts, ratification would not be possible save by Congress. In the present cases it is unnecessary to pursue the inquiry, since, as has been pointed out, there was in fact no purported ratification of the contracts.

The cases cited by petitioners on this point (Brief in No. 31, p. 26) are not apposite. *United States* v. *North American Company,* 253 U. S. 330, has already been discussed. *City of Findlay* v. *Pertz,* 66 Fed. 427 (C. C. A. 6) held that the jury might consider whether there had been a ratification by the governing board of a municipal corporation after a contract for personal property had been entered into by an employee in breach of fiduciary duty; there was no authority in that case to take possession of the property independently of contract. In *In Re Cuban-Atlantic Transport Corp.,* 57 F. (2d) 963 (C. C. A. 2) it was held that the board of directors of the

Shipping Board had acquiesced in and ratified a contract made by a subordinate with a purchaser who had been substituted for the purchaser originally approved; the case involved simply an excess of delegated authority by a subordinate, and not a question of illegality or public policy.

In retaining the property the United States is not seeking to enjoy its benefits without compensation. On the contrary, the Government stands ready to pay the fair value of the land as of the date of original taking of possession, with interest on that amount to the date of making the deposit of estimated compensation, and with interest on any deficiency until paid. Thus there is not presented the question in *Pan-American Petroleum Co.* v. *United States*, 273 U. S. 456, 503–510, where it was held that any compensation for property acquired illegally and as part of a fraudulent plan must be sought from Congress and would not be made a condition of rescission and an accounting. Cf. *Restatement of Contracts*, sec. 480.

A word should perhaps be added to meet the possible contention that the situation confronting the officers charged with the acquisition of land for the Weldon Springs project was so exigent that all normal safeguards could justifiably be abandoned. It is true that we make no suggestion of fraud on the part of the officials

involved, and it may freely be acknowledged that the arrangement with McDowell was motivated by considerations of haste. But fraud is not the only matter which will serve to set aside a public contract; the actions of contracting officers must be examined "to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents * * *." *Hume* v. *United States*, 132 U. S. 406, 414.

Neither in congressional enactment nor in the realities of the situation could there be found justification for the extraordinary procedure adopted. It appears from the testimony that, faced with the necessity of acquiring land for over 100 projects, the Chief of the Real Estate Section of the Quartermaster Corps was able to arrange for purchases in more than 100 of these through regularly employed personnel or other agencies of the Government, and resorted to brokers with a fixed fee in two instances, while employing the percentage commission device in eight (R. 288). Shortly after the events here in question the Real Estate branch was reorganized and the practices here condemned were abandoned.[12] Moreover, condem-

[12] See testimony of the Under Secretary of War, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st sess., on the Military Establishment Appropriation Bill for 1942, p. 80; H. Rep. No. 2272, 77th Cong., 2d Sess., p. 20. On December 16, 1941, the Construction Division of the Quartermaster Corps was transferred to the Corps of Engineers. *Id.* p. 4.

nation was available in an expeditious form. Under the Act of July 2, 1917, c. 35, 40 Stat. 241, as amended, 50 U. S. C. sec. 171, the Secretary of War was authorized in time of war, or the imminence thereof, upon the filing of a petition for the condemnation of any land, to acquire immediate possession and occupancy for military purposes. (Cf. R. 253, 292.) Also, Congress had removed the requirement that title be approved by the Attorney General prior to construction for the Military Establishment. Act of September 9, 1940, c. 717, 54 Stat. 872, 873. The abandonment of recognized principles of public contracting disclosed by the present cases cannot be justified by considerations of urgency.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgments below should be affirmed.

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APPENDIX

Act of July 2, 1917, c. 35, 40 Stat. 241; Apr. 11, 1918, c. 51, 40 Stat. 518, 50 U. S. C. § 171:

The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of War is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for

the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes.

Act of February 26, 1931, c. 307, § 1, 46 Stat. 1421, 40 U. S. C. § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto--

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so re-

ceived by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Section 1 of the Act of July 2, 1940, 54 Stat. 712:

That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; * * * *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use

of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

Criminal Code, sec. 112, 18 U. S. C., sec. 202:

Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void.

Criminal Code, sec. 113, 18 U. S. C., sec. 203:

Whoever, being elected or appointed a Senator, Member of or Delegate to Con-

gress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES.

Nos. 31 and 32.—October Term, 1944.

James Karl Muschany and Vera Muschany, Petitioners, 31 *vs.* The United States of America. William M. Andrews and Bertha L. Andrews, Petitioners, 32 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 5, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

Writs of certiorari were allowed to petitioners by this Court in these two cases to review the action of the Circuit Court of Appeals for the Eighth Circuit.[1] That appellate court reversed the action of the District Court of the Eastern District of Missouri which had upheld the validity of contracts between petitioners and the United States for the purchase of land for the Weldon Springs, Missouri, ordnance plant.[2] The contracts were pleaded by petitioners as defendants in eminent domain suits to establish the proper condemnation award.

The petitions for certiorari were granted, 321 U. S. 760, because of asserted conflict with *United States* v. *Grace Evangelical Church*, 132 F. 2d 460. Jurisdiction of this Court rests on Section 240 of the Judicial Code.

Under the authority of the Second Supplemental National Defense Appropriation Act of 1941, 54 Stat. 872, the President approved the Weldon Springs project on October 17, 1940. Pursuant to this approval, the War Department claims that it proceeded to acquire the necessary land under the act of July 2, 1917, 40 Stat. 241, as restricted by the National Defense Act of July 2, 1940, 54 Stat. 712. The statutory authority of the War Department to proceed as it did is not questioned except on the issue of

[1] United States v. Muschany, 139 F. 2d 661.

[2] United States v. Certain Land, etc., 46 F. Supp. 921.

whether the purchase contracts entered into in acquiring the needed land violate the first section of the act of July 2, 1940, which provides:

"*Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-fixed-fee form of contract when such use is deemed necessary by the Secretary of War." 54 Stat. 713.

The duty to act for the War Department in obtaining the land lay in the office of the Quartermaster General and specifically in the Real Estate Branch of that office. In an effort to expedite the acquisition of the needed land, the head of that branch, Colonel R. D. Valliant, contracted with R. Newton McDowell to act as the agent for the Government in securing options, on forms approved by the United States and attached to the employment contract, from the owners for submission to and acceptance by the United States. Mr. McDowell's compensation for acting as agent was a "five per cent (5%) commission . . . to be paid by the vendor."[3]

The employment of McDowell as agent to secure options for the United States was confirmed by the War Department to the Citizens Committee, an informal organization of those who owned property which was needed for the proposed project. McDowell went to work to carry out his contract. He held meetings at which he explained to the landowners the plan to secure options and the

[3] The pertinent parts of the McDowell agency contract are:

"3. The Optioner shall diligently endeavor to acquire such options, not only within such time, but at the reasonable value of the land to be acquired, and subject at all time to the directions of the Government. The form of option contracted to be executed, and all terms, convenants and conditions thereof, shall be on the form approved by the Government, and a copy of which is to be attached hereto and made a part hereof. It is understood that the Government is to have the exclusive right to take up or reject any option to any parcel of land optioned by said Optioner hereunder, except as hereinafter provided.

"4. . . . The Optioner shall procure from the vendors in all cases where options are accepted on behalf of the United States, an order to the Kansas City Title and Insurance Company, to prepare certificates of title and deeds and it shall be his responsibility to see that said certificates of title and deeds are transmitted to the proper Government official for examination. The certificates of title, to be furnished by The Kansas City Title and Insurance Company will be on forms similar to the one attached hereto and made a part hereof and funds to effect closing of purchases by the Title Company will be furnished by the Government to the Title Company in form of checks payable to each vendor in the amount of the purchase price set forth in the accepted options."

"8. For all services hereunder the compensation of the Optioner shall consist solely of the five per cent (5%) commission in each purchase, to be paid by the vendor, as more specifically set forth in the form of option attached hereto and made a part hereof."

option form itself. From his explanation the landowners must have understood that their sale price would have deducted from it McDowell's commission and other expenses. This was also the understanding of the Government, as is shown not only by the documents themselves which were approved by the Government but also specifically by the testimony of Colonel Valliant. While McDowell was employed and his commission set by the Government, it was arranged that McDowell should collect his money from the vendor so that a single voucher would cover the purchase price and the expenses.

The approved form of option, which was a part of McDowell's contract with the Government, was used by McDowell in the particular transactions which are under examination in these proceedings. The option accords with the requirements of the McDowell contract and in addition provides for an agreed valuation at the option price in case of condemnation.[4] The offer was accepted by the Government.

There were a large number of landowners in the required area. Options were obtained from 270, including the petitioners, and with one exception the options were accepted by the Government at the optioned price. Almost half of the contracts were closed by acceptance of deeds and payment of the price. Criticism of the prices and manner of purchase developed and the War Department repudiated the remaining contracts and turned to condemnation. The repudiation followed upon the conclusion among other things that the contracts violated the statutory provision against the cost-plus-a-percentage-of-cost system of contracting, page two, *supra*, and were contrary to public policy because of the

[4] "Upon exercise of this option by the Government, the undersigned agrees to pay to R. Newton McDowell a commission of five per cent (5%) of the gross sales price as full payment for the services of said R. Newton McDowell in procuring such sale, preparing the deed or deeds for the conveyance of said land and arranging for settlement and closing of the transaction."

"Upon furnishing of final certificate of title as above showing title to be vested in the United States of America, the agreed purchase price above mentioned will be paid by the Government to the undersigned.

"If for any reason the title to the land is not approved by the Attorney General, the Government will proceed to acquire the land by condemnation proceedings instituted in the District Court of the United States in which said property is located, under a consent verdict fixing the award at the agreed valuation and in accordance with all the terms and provisions of this option and will upon filing its petition in such proceedings deposit said agreed purchase price with the clerk of said court, same to be disbursed by said officer pursuant to the decree entered in such condemnation proceedings."

contingent interest of McDowell, which was antagonistic to the Government.

Petitioners' options were among those accepted only to be repudiated later, the Government then instituting condemnation proceedings to obtain petitioners' lands. In the two condemnation proceedings instituted against petitioners judgments were entered upon a declaration of taking which vested titles in the United States. 46 Stat. 1421. Thereafter the petitioners here filed their answers in which they consented to the condemnation and demanded that the price which was fixed in the option, accepted by the Government, be adopted by the trial court as just compensation. In reply the Government set up its repudiation of the contracts on numerous grounds including fraud, such unfairness to the Government because of gross overvaluation that the contract should not be enforced in equity and good conscience as well as the disregard of the statutory proscription and public policy, which was referred to in the preceding paragraph as the ground for repudiation.

The two cases were decided in favor of the validity of the contracts and the compensation was fixed at the price stated in the contract without revaluation. Consequently there was no occasion for the trial courts to determine whether valuation measured by just compensation would have varied from the agreed price. The Government makes no objection to this manner of determining compensation if the accepted options (contracts) are valid. Compare *Danforth* v. *United States,* 308 U. S. 271, 282. In one case the findings of fact and a comment appear as a memorandum opinion in *United States* v. *Certain Land, etc.*, 46 F. Supp. 921. In the other case, the decree was entered without separate findings of fact or opinion after adoption of the memorandum in the first case. We perceive nothing in the record to distinguish the cases here and shall dispose of them in a single opinion.[5]

The following determination appears in the opinion of the trial court for these cases, 46 F. Supp. at page 928:

"There is an absence of any showing that facts were concealed, that misrepresentations were made, or that duress was used. The

[5] A stipulation consolidates the record of the two cases before us and a third case, not here involved, United States *v.* 94.68 Acres of Land, St. Chas. Co., Mo., 45 F. Supp. 1016, and authorizes its use "as a part of the record in each of the two" cases here on review. While the cases have not been consolidated, one was set on our docket for hearing following the other, the United States has filed a single brief and petitioners a joint reply brief.

price stated in the option contract is not unconscionable. There is no fraud, actual or constructive, in this case."[6]

As a result of this conclusion, the issues of corrupt action in these two instances are decided contrary to the Government's contention at the trial. No such contention was made by the Government here. The findings also stated, at page 925:

"There is no evidence that the option price of forty-five hundred dollars included the amount the defendants asked for the land plus McDowell's fee of 5% of sale price, the Kansas City Title Insurance Company's fee of 1½% for examining title, the stamp tax or the recording fee."

We treat the finding and determination as applicable to both cases.

On appeal the Circuit Court of Appeals found, contrary to the trial court's finding quoted above, that the commission and expenses were added to the vendors' net price. We agree with the appellate court. While no direct evidence appears as to the addition of the expenses to the vendors' net price, it seems clear from the agreement between the Government and McDowell, the option contract, the statements of McDowell at public meetings, the advice given by the citizens' committee and Colonel Valliant's testimony that it was generally understood that the option price was to be calculated in this way. Although Messrs. Muschany and Andrews were not asked specifically as to how they figured their gross prices stated in the options, both were present at a meeting at which McDowell explained his contract. Since the vendors agreed by the contract to pay all commissions and expenses, they must have added these expenses to what they expected to receive net for their land. Whether the addition was by precise arithmetical computation or by intuitive action is immaterial. The mere fact that no separate statement of the items appears in the evidence in these cases would not overturn the force of this general and definite understanding.

The Court of Appeals was of the opinion that the contracts with the landowners were cost-plus-a-percentage-of-cost and therefore

[6] In the Muschany case, the average valuation of eight Government witnesses, for land upon which the option was taken at $4500, was $1972. The average valuation of seven of respondent's witnesses was $4546. 46 F. Supp. 925.

No finding of value appears for the Andrews case but the evidence shows an average valuation by Government witnesses of $3114 and by the vendor and one of his witnesses of $12,000.

invalid. Any further examination by it of the Government's contention that the contract was contrary to public policy was unnecessary. Petitioners here attack the first conclusion. The Government defends the action of the appellate court on this ground and also because independently of the cost-plus prohibition, the contracts between the landowners and the Government were contrary to public policy.

Prior to consideration of the two principal issues raised by the petitioners and respondent in their arguments before this Court, it seems necessary to refer to the allegations of fraud, unconscionable dealing, bad faith and misrepresentation on which respondent relied in the trial court as invalidating petitioners' contracts. As is indicated, pp. 4-5 *supra*, the trial court specifically found against the respondent on these issues. Nor did the Circuit Court of Appeals reverse the trial court's findings. Fraud, misrepresentation and duress were not argued before this Court. Since the trial court's findings on these issues are supported by substantial evidence, it is not for this Court to undertake an independent examination of these issues as such, or under the guise of determining "just compensation."[7] Only recently this Court restated the rules relating to the weight to be given fact determinations by inferior judicial or quasi-judicial bodies. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 297-98; *Dobson* v. *Commissioner*, 320 U. S. 489, 321 U. S. 231. Therefore this case comes before this Court without any suggestion of fraud or unfairness such as would justify holding the contracts invalid. Since these matters are not before us, we need express no opinion on this aspect of the case.

[7] Petitioners in No. 31 contracted to sell the government certain land for $4,500, which they had purchased in 1939 for $1,000. The record indicates that since purchasing this land in 1939, various improvements had been made. At the time of purchase there was no highway leading from the main road to the property; a thicket was cleared and a road constructed which passed over an adjoining piece of property. The cultivable area of the land was increased by clearing timber thickets from part of the property. A local drainage district surfaced with rock the river frontage of the property, presumably to stop erosion. There is also evidence indicating that petitioners in No. 31 made a very good buy when they purchased this land for $1,000. It was in the hands of prior owners who had allowed $800 in back taxes to accumulate on the property. As to petitioners in No. 32, they sold land to the government in 1940 at a price of $12,000 for which they paid $2250 in 1934. The lapse of a six year period of time, the change in economic conditions from those of a severe agricultural depression to one of wartime agricultural prosperity furnishes some explanation for the disparity between the price paid for the land in 1934 and the price at which it was valued in 1940.

The federal district court admitted evidence which indicated that McDowell engaged in questionable conduct in securing options from sellers other than the petitioners in the instant case. Such evidence is not relevant to the issue of the validity of petitioners' contracts. The enforceability of petitioners' contracts is not to be determined or colored by McDowell's alleged dealings with other parties; these other contracts are not involved in the instant case and circumstances which might urge a different result with respect to them must be carefully eliminated lest petitioners be penalized for illegal acts of others.

There remains to be considered the question whether mere disparity between the original cost of these lands to the seller and the sale price to the government makes the contracts illegal—whether a contract with the government is invalid on a mere showing that it was highly profitable but not unconscionable. Congress' adoption of statutes providing for the renegotiation of war contracts indicates that in certain instances the government seeks to recover abnormally high contract profits. That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court.[8]

It goes without saying that in all dealings with the government contractors and agents alike are under an obligation to deal strictly within the limits of the statutes and with absolute honesty. Criminal sanctions enforce this rule. Similarly, the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealing between the government and its citizens. These remedies are available whenever and wherever transgressions take place. However the right to determine the policies or methods by which property is to be acquired rests with Congress.

Applicability of cost-plus-a-percentage-of-cost clause. Prior to the present war emergency the Secretary of War had broad powers to acquire land for military purposes by purchase at prices deemed reasonable by him or by condemnation.[9] There were no

[8] Legislation in regard to the renegotiation of war contracts is not applicable to either of the contracts involved in this case. See Revenue Act of 1942, ch. 619, 56 Stat. 798, Title VIII—Renegotiation of War Contracts—Sec. 801(c)(6); Revenue Act of 1943, ch. 63, P. L. 235, 78th Cong., 2d Sess., Title VII, Sec. 701(b), Sec. 403(c)(6).

[9] Act of July 2, 1917, 40 Stat. 241; Act of April 11, 1918, 40 Stat. 518.

restrictions as to the manner in which he should exercise this power to purchase, but his power to contract for construction work was sharply limited by statute.[10] These restrictions, if continued, would have seriously impeded the War Department's preparation for war. Thereupon Congress passed the act of July 2, 1940, which removed certain of these prior statutory restrictions. The act did, however, restrict the broad powers conferred therein by prohibiting the use of cost-plus-a-percentage-of-cost contracts; use of cost-plus-a-fixed-fee contracts was expressly approved by the act.[11] The question is raised as to whether the prohibition of cost-plus-a-percentage-of-cost contracts applies to the War Department's purchase of these lands with appropriations for the fiscal year 1941.

We are of the opinion that the first section of the act of July 2, 1940, see footnote 11, indicates that the purchase of land by the War Department is subject to the provisions of that section; therefore, the proviso in the section which prohibits use of the cost-plus-a-percentage-of-cost system of contracting must be taken to apply to purchases of land. The act of July 2, 1917, 40 Stat. 241, 518, authorizing the purchase of land, is limited by the quoted section from 54 Stat. 712.

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[10] R. S. § 1136; R. S. § 3734; 10 U. S. C. § 1336; The Walsh-Healey or Prevailing Minimum Wage Act, 49 Stat. 2036.

[11] 54 Stat. 712: "That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; . . . *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

Our next inquiry is as to whether the contract with the vendors, note 4, *supra*, violates this prohibition against cost-plus-a-percentage-of-cost contracts. Evidently the proviso was inserted to avoid the abuses which were prevalent before and during the first World War from the Government's guarantee of cost plus a profit to contractors.[12]

The purpose of Congress was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs. The evil of such contracts is that the profit of the other party to the contract increases in proportion to that other party's costs expended in the performance. The danger guarded against by the Congressional prohibition was the incentive to a government contractor who already had a binding contract with the Government for payment of undetermined future costs to pay liberally for reimbursable items because higher costs meant a higher fee to him, his profit being determined by a percentage of cost. Congress certainly did not intend to prevent a party who was merely submitting a bid to the Government from computing the amount of his bid by taking into consideration his costs and then adding a certain percentage of the cost as his profit, the resulting sum bid being fixed in amount and not subject to change. Congress, by changing the original prohibition in the act from one outlawing any "cost-plus" system of contracting so as to expressly authorize use of a "cost-plus-a-fixed-fee" form of contract, indicated it did not care how the contractor computed his fee or profit so long as the fee or profit was finally and conclusively fixed in amount at the time when the

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[12] 86 Cong. Rec. 7839, 7841, 7843. The proviso as adopted by the Senate read: "That what is known as the cost-plus system of contracting shall not be used under this section." We do not know the precise reason for the change from this language to the present, as it took place in conference. The statement from the managers on the part of the House reads:

"[The conference bill] substitutes for the limitation upon the use of the cost-plus system of contracting a provision which bars the use of the cost-plus-a-percentage-of-cost system but allows the Secretary of War, when he deems it necessary, to use the cost-plus-a-fixed-fee form of contract." H. Rep. No. 2578, 76th Cong., 3d Sess., p. 6.

It might be inferred that the change was made to accord with the clause allowing cost-plus-a-fixed-fee. Whatever the reason for the change the final form is less restrictive on the War Department than the "cost-plus" system which was first forbidden.

Government became bound to pay it by its acceptance of the bid. By eliminating the risk of loss and permitting the guarantee of a satisfactory but fixed fee, Congress sought prompt performance and lower over-all expenditures for contracts in a rising labor and commodity market than would be offered by contractors who were compelled themselves to assume the risk of these unpredictable costs.

The vendors' contract, when read with the McDowell contract, shows that the Government arranged for a fee to its agent based on a percentage of the purchase price. This does not fall within the language of cost-plus-a-percentage-of-cost. The offer was to sell to the Government at a fixed, definite price. The Government when it accepted this offer agreed to pay this set amount and no more. The contract contains no provision allowing adjustment of price based on possible future indeterminate expenses. The vice of cost-plus contracts is not inherent in the vendors' contract. That vice basically is the incentive to the contractor to inflate his future costs to increase his profits since the Government is already bound to pay any future undetermined "costs." The amounts to be paid under petitioners' contracts are not subject to change by future action of the vendor. The Government knew the total cost when it became bound on the contract. If we read the vendors' contract as affected by the McDowell contract, no cost-plus contract emerges. The United States knew its agent's fee to the penny when it accepted the option. It was five per cent of the gross sale price. Notes 3 and 4 *supra*. That is to say, the price to be paid for the land was subject to the approval of the Government. The War Department could accept or reject the offers submitted by McDowell. When the War Department approved each offer, it fixed the precise fee which McDowell was to receive. The arrangement may have been improvident from the point of view of the Government. But that question goes to the quality of management by its procurement officers. The fact that the procurement system is improvident obviously does not make it illegal. Illegality does not emerge from inadequate supervision of prices by the Real Estate Branch. Such official failures are not chargeable to a third party dealing with the Government in good faith. It may be unwise for the Government to pay its purchasing agent a commission which is figured on cost of purchases to the Government but there is no statutory prohibition. Since the United States is the pur-

chaser of the land at the option price, no one can receive cost plus anything. Neither the vendors nor McDowell agrees to buy from a third party and sell to the Government at an advance. The vendors' contract has neither the form nor the vice of a cost-plus contract.[13]

Public policy. The Government advances a further and distinct argument for affirming the judgment of the Circuit Court of Appeals that the vendors' contract is invalid. This is that the contracts of Muschany and Andrews are invalid as against public policy because of the interest of McDowell which is antagonistic to the United States and because of the contingent character of the McDowell fee which, it is asserted, is paid by the vendors for the procurement of the contract of sale. We think that it is inadmissible to view the McDowell contract and the vendors' contracts as unrelated. On account of the vendors' thorough understanding of McDowell's agency, as discussed in the preceding division of this opinion, their contracts must be read as though the McDowell contract was written into them to show his agency for the Government.

When this is done, it is clear that the objection to the vendors' paying a fee contingent on the securing of a Government contract disappears. While in form the McDowell fee and other expenses are paid by the vendors, it was so handled, as is shown by the finding of the trial court, that "the several transactions [might be] closed with the issuance of one, instead of several vouchers, for each tract." 46 F. Supp. at 925-26. The evidence indicates that in reality McDowell was the Government's agent and that his commission, although nominally paid by the vendor, amounted to a payment by the Government to him as its agent. Contingent fee contracts to secure Government business for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure. *Steele* v. *Drummond*, 275 U. S. 199, 206.[14] For the most part these cases have involved situations where a would-be contractor has hired a third person on a contingent fee basis to procure for the former a contract with the Government. But neither the language of these cases nor the policy behind them

[13] But see United States v. Two Acres of Land, etc., 144 F. 2d 207.

[14] Cf. Tool Company v. Norris, 2 Wall. 45; Trist v. Child, 21 Wall. 441, 449-52; Hazelton v. Sheckells, 202 U. S. 71, 78, 79; Crocker v. United States, 240 U. S. 74, 78-81.

applies to the situation involved in this case, where the Government, not the would-be contractor, hires an agent for the purpose of soliciting offers from owners of needed land, the agent's compensation to be contingent on submission of offers acceptable to the Government. We have here a contingent fee contract of an entirely different type. It is the Government here who pays the contingent fee and pays it not for securing a contract from the Government but a contract for the Government. The agent acts under the highest legal and moral responsibilities to his principal, the Government. There is no place for financial temptation or political pressure to influence public officials. Tendentious fraud does not exist in such a contingent contract. It may be most desirable to pay agents only in the event that they are successful in accomplishing their purpose. We are dealing here with public policy. Congress may think that it is wise to outlaw contingent contracts such as this but until it does we cannot say that they are contrary to public policy, any more than we could say cost-plus contracts are contrary to public policy in the absence of legislation to that effect.

In reaching the foregoing conclusion on the contingent fee aspect of the problem, we laid aside consideration, from the standpoint of public policy, of the fact that the contingent fee is to be measured by a certain percentage of the purchase price. We now consider that. The record gives no satisfactory explanation for the apparently ingenuous action of the Real Estate Branch of the War Department in paying a commission on the purchase price to its soliciting agent. Certainly the officers realized the possibility of and temptation to price inflation. Necessity for speedy acquisition could not have been their motive in view of the possibilities of a declaration of taking. 46 Stat. 1421. It well may be that experience with condemnation awards and the cost of acquisition by salaried government servants appeared to foreshadow more expense than the plan adopted.[15]

It may have been the Department's conclusion that its officers could regulate the offer of prices above the market by a refusal to accept the options. Colonel Valliant visited the area to gather information during the purchases. Our inquiry at this point,

[15] Testimony of Under Secretary Patterson, April 29, 1941, before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

since corruption is not shown, is as to whether the likelihood of disadvantage to the Government is so menacing as to prohibit such contracts regardless of the effect in a particular case.

No other case has come to our attention which has declared that a commission or purchase contract is invalid on the ground of public policy. Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal* v. *Philadelphia*, 2 How. 127, 197-98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353; *Frost & Co.* v. *Mines Corp.*, 312 U. S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy.[16] The courts must be content to await legislative action.

The Government calls attention to Criminal Code, sections 41, 112 and 113, and the act of March 3, 1917, 39 Stat. 1106,[17] as indicative of a declared public policy against an agent of the United States being permitted to have a pecuniary interest in a contract when that interest would be enhanced in value at an expense to the United States. But these sections relate to a Government official's representation of the Government in matters involving a private corporation or firm in which the Government agent has an interest, or a Government official's receipt of consideration for procuring a contract from the Government for any person or for any service rendered in relation to any such contract, or receipt of any salary or supplement to salary in connection with his government services from any source other than the Government of the United States. Thus these sections manifest a legislative intention to bar a government agent from receiving pay

[16] Cf. Chicago & Railroad Co. v. Pullman Car Co., 139 U. S. 79, 89; Baltimore & Ohio &c. Railway v. Voigt, 176 U. S. 498, 513-520.

As examples of contracts which have been held invalid as acts or contracts against public policy, see Sprott v. United States, 20 Wall. 459; McMullen v. Hoffman, 174 U. S. 639; Burt v. Union Central Life Insurance Co., 187 U. S. 362.

[17] See also Executive Order 9001, Title I, § 1, Title II, §§ 5, 6, 6 Fed. Reg. 6787; 50 U. S. C. § 611, n., (appendix).

from a third party for assisting that third party to secure a government contract.

Here the pay was for services rendered to the Government. In form the vendors agreed to pay the compensation but actually the United States was the payor. As stated above it was merely a convenient way in which the Government's promise to pay its agent could be met.

It is quite clear that these prohibitions against receipt of compensation from third parties for securing contracts were directed at the crime of bribery in its open or subtle form. We do not see that these statutes manifest a public policy against the use of a commission system for public purchases. The change after experience, from the commission system of land purchases to the solicitation of options by salaried employees of the Government or fixed fee contractors, indicates administrative judgment of desirability, not administrative condemnation of the legality of the method.[18]

Since it is Congressional enactments which determine public policy, any doubt which might exist as to the legality of such an arrangement as was adopted by the War Department for this and a few other projects is dissipated by the action of Congress on the Military Establishment Appropriation bill for 1942. Apparently a limitation of commissions on land purchases was omitted from the bill in accordance with suggestions of the War Department.[19] The commission type of contract was recognized as appropriate in certain circumstances by the Naval Appropriation Act of 1942, 55 Stat. 151, 177.[20] A similar provision appears in the Military Appropriation Act of 1944, Sec. 12, 57 Stat. 347, 369.[21]

We have considered the Government's contention that the two per cent limitation means that not more than two per cent of the

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[18] See the testimony of Under Secretary Patterson, Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, on the Military Establishment Appropriation Bill for 1942, 77th Cong., 1st Sess., p. 106.

[19] Hearings, *supra*, n. 18, p. 106; Hearings before the subcommittee of the Committee on Appropriations, United States Senate, 77th Cong., 1st Sess., on H. R. 4965, pp. 47-48.

[20] 55 Stat. 177: "SEC. 7. No part of any money appropriated herein or included under any contract authority herein granted shall be expended for the payment of any commission on any land purchase contract in excess of 2 per centum of the purchase price."

[21] See also Executive Order No. 9001, Title I, 6 Fed Reg. 6787, 50 U. S. C. § 611, n. (appendix).

estimated price may be paid as a fixed fee.[22] There is nothing that indicates to us that the provision is not intended to apply to the contracts for commission on the purchase price of land. This was the system which the witnesses considered dangerous.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[22] See Hearings before the subcommittee of the Committee on Appropriations, House of Representatives, 77th Cong., 1st Sess., on the Navy Department Appropriation Bill for 1942, pp. 502-504, 505-509; Hearings before the subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 1st Sess., on the Military Establishment Appropriation Bill for 1942, pp. 46-50, 53.

Mr. Justice BLACK, dissenting.

The Constitution provides that the government shall not take private property for a public purpose without payment of just compensation. The problem here is whether the arrangements now before us give rise to enforcible agreements or whether the rights of the parties are to be governed by the constitutional requirement for "just compensation" for the land needed by the government. More specifically, the question is whether in the situation revealed by this record the law demands that certain property holders shall receive in payment for their properties amounts which, even in the absence of a finding of fraud, may well be far in excess of what is "just compensation", thereby imposing an unjust burden on the public. The Court says "Yes"; I say "No".

The agreements were executed under the following circumstances. A War Department representative agreed that one McDowell should undertake to secure options to buy 18,000 acres of land at Weldon Springs, Missouri, where the government was about to build a war munitions plant. Under the original agreement McDowell was to receive from the government a commission of 5% of the gross sale price of each parcel of land. Later, McDowell, presumably with the acquiescence of the contracting officer, adopted a plan under which the landowners executed options for a price which included the 5% commission. Thus, the less the cost of the lands the less McDowell would make; the greater the cost, the greater his commission.

The ensuing results were, if not inevitable, at least not surprising. With phenomenal speed McDowell obtained 270 separate options and promptly recommended their purchase to the Department at the stipulated prices. On what appears to have been no more than an inescapably formal examination of these recommendations,[1] 129 options were accepted and contracts of purchase were executed at an expense of approximately a million dollars to the government. After an investigation of the whole affair by the Department of Justice the remaining 149 contracts were repudiated by the government, condemnation proceedings were filed, and immediate possession of the land was awarded the government. See 46 Stat. 1421. In the condemnation proceedings the government sought, as to the uncompleted McDowell transactions, to pay no more than just compensation for the properties.

This Court now holds that the government is irrevocably bound by the contracting officer's "acceptance" of the McDowell options. And while the immediate judgment directly affects only the two pieces of property here involved, the principles announced uphold the validity of all the McDowell-procured agreements, even though the agreed cost stipulated in those agreements might in condemnation proceedings be judicially determined to exceed just compensation. The District Court in these two cases did not determine what would be just compensation. It found no more than that the option agreed price of these particular lands was not "unreasonably excessive." The District Court did not find that the agreed prices represent a fair market value; the opinion of the Circuit Court of Appeals makes it clear beyond doubt that it was impossible to make such a finding. The record shows that the government will now be required to pay the petitioners in No. 31, a value, as of 1940, of $4500.00, or $165.00 per acre, for land

[1] At the time of these purchases, the Real Estate Section of the Quartermaster Corps was in charge of land procurement. Because of intensive National Defense activity, this section had under way purchase of lands for one hundred and eight separate projects, involving between twelve and fifteen thousand individual parcels, with an estimated value of about fifty million dollars. The Colonel in charge of the section had at his disposal a staff of three commissioned officers and about forty-one civilian employees. This Army office, in charge of nation-wide land purchases, was therefore compelled to rely chiefly upon McDowell's valuations.

The Muschany transaction is a typical one. November 29, 1940, McDowell sent the option agreement to the Washington purchasing office recommending its "acceptance as a fair value to the United States." Four days later, December 3, without separate appraisal of any kind, the Washington contracting officer marked it "accepted." This was the only contract executed with the landowner by the government, if such an action can be called a contract at all.

which petitioners bought in 1939 for $1000.00, or $33.33 per acre. The other petitioners are to be the beneficiaries of a similar "contract" bounty. For lands and improvements which cost them $2250.00 in 1934, or about $24.00 per acre, the government must pay $12,000.00, or $127.00 per acre.[2]

The details of the negotiations between McDowell and the landowners are set out in the opinion of the Circuit Court of Appeals and need not be repeated at length here. Reference is there made to successive recommendations by McDowell on the same parcel of land for purchase at $4500.00, $10,000.00 and $4900.00. In another instance a landowner refused the request of one of McDowell's representatives to up the price of his property $50.00 per acre. Still other illustrative items included in agreed prices, such as those which the Court today holds invulnerable, are "one year's loss in salary of each partner" and $6500.00 for "loss of business."

Nothing but the clearest and most unequivocal Congressional enactment could in my judgment bind the government to such arrangements. There is no such enactment. And even if Congress had not itself condemned such contracts as these, conceivably, they are within the ban of principles previously enunciated by this Court.[3] For the terms of McDowell's contract, which was an integral part of the purchasing system here involved, were such that the harder he worked to reduce the price of the land he bought, the less he made. He could not possibly serve most profitably his own interest and that of the government at the same time. Only by acting to the financial disadvantage of the government could he act for the financial advantage of himself.

It was to protect the public from the dangerous tendency of the excesses of just such contracts that Congress has repeatedly prohibited[4] the War Department from using "the cost-plus-a-

[2] In referring to the District Court's finding that $12,000.00 was "not an unreasonably excessive valuation of the land in question," the Circuit Court of Appeals made this comment:

"The latter finding is perhaps a bit strained, since the substance of the evidence on behalf of the landowners was simply that the land had a farm value of only $50 an acre (a total of $4,725), but, as the landowners' only value witness put it, 'I think someone from St. Louis that wants a site would put as high as $125 an acre [a total of $11,800] for that ground.'"

[3] Marsh v. Whitmore, 21 Wall. 178; Michoud v. Girod, 4 How. 503; Tool Co. v. Norris, 2 Wall. 45; Hume v. United States, 132 U. S. 406; United States v. Carter, 217 U. S. 286; Crocker v. United States, 240 U. S. 74; see also the opinion of District Judge Collet in 45 F. Supp. 1016.

[4] "As a result of experiences with cost plus a percentage of cost contracts during the first World War and the early part of this war, use of this type of contract is now almost without exception prohibited by statute." C. C. H.

percentage-of-cost system of contracting." Congress had in 1936 received a report from a special Senate Committee investigating the munitions industry pointing out the evils of that contracting system. That report said: "It is generally admitted that exorbitant profits were made under cost plus a percentage of cost contracts in the World War. . . . The profiteering under cost plus a percentage of cost contracts in the last war was so flagrant that Congress has expressly disapproved of their use for Government procurement."[5]

The same Senator who made this report, initiated a Senate discussion which led to the immediate adoption of the prohibition of "cost-plus-a-percentage-of-cost" contracting in the Act here involved. He excoriated the cost-plus-a-percentage system as a "vicious" one.[6] It was this "system of contracting" which Congress forbade, a system which from its very nature keeps constantly dangling before the eyes of the government's contractual agent hope of a progressingly increasing reward for himself for every added dollar of cost he can get the government to pay. This system of contracting was not deemed "vicious" for lack of "certainty" as to costs, but because of the "certainty" of its inexorable tendency to elevate those costs to heights which would impose unfair burdens on the public treasury.

War Law Service, Government Contracts, Par. 1015. See Act of June 28, 1940, sec. 2(a), 54 Stat. 676, 677; Act of May 2, 1941, sec. 2(c), 55 Stat. 148; Act of December 18, 1941, Title II, sec. 201, 55 Stat. 839. See also, Act of June 30, 1941, sec. 9, 55 Stat. 393, and Act of June 5, 1942, sec. 13, 56 Stat. 317. The regulations issued by the President under the First War Powers Act of 1941, applicable to the War Department, the Navy Department, and the United States Maritime Commission, likewise expressly prohibit cost plus a percentage-of-cost contracting. Executive Order No. 9001, December 27, 1941, as amended, Title II, sec. 6.

[5] Senate Report No. 944, 74th Cong., 2d Sess., Special Committee Investigating the Munitions Industry, Part 4, at page 22.

[6] "So there is nothing to hinder the present Secretary of War, or any other Secretary of War, if he desires to do so, from going back to the old, vicious cost plus system which we had during the World War, when, in one instance which fell under my observation—not in the War Department, but in the Navy Department—in the construction of naval vessels on a cost plus 10 percent basis, in making up the cost base on which the people of the United States were required not only to pay cost but to pay 10 percent additional, one great shipbuilding company in this country added in the cost of wines, liquors, and cigars used on the trial trip, and the cost of the prize given to the lady who christened the ship. They even added in the cost of representatives maintained by the company in China and in Japan for the purpose of promoting other business of the company on the theory that if they secured any outside business it would reduce the overhead chargeable to the Government." Cong. Record, Vol. 86, Part 7, p. 7839, 76th Cong., 3rd Sess. Another Senator, in the same discussion, said with reference to this system of contracting, "A man will say, 'I have a return of 10 percent of the contract price, and I will get what I can under it, pile up expenses, and so forth.'" Cong. Record, Vol. 86, Part 7, p. 7841, 76th Cong., 3rd Sess.

That this was the moving purpose in prohibiting such a contract system is further shown by the fact that Congress at the same time permitted a "cost-plus-a-fixed-fee form of contract." Certainly Congress could not thereby have intended to reduce the scope of its sweeping condemnation of "cost-plus-a-percentage-of-cost system." On the contrary, permission to use the fixed fee contract but underlines the Congressional intent absolutely to prohibit any War Department agent from using a system of contracting which would impose upon the government inflated costs by providing an incentive to pad costs or to take too rosy a view of value. Whatever other disadvantages the cost-plus-a-fixed-fee system may have, no incentive to raise the cost arises from the fixed fee. But when a percentage fee or compensation is provided for, which diminishes or increases in proportion to costs, there is ample motive or at least tendency to increase such costs.[7]

That incentive looms large in the contracts here involved.[8] It matters not into what form the arrangement is cast. It is conceded that had this contract required McDowell himself to buy and take title to the lands, the arrangement with him would have been within the Congressional prohibition as a "cost-plus-a-percentage-of-cost" contract. But the fact that he did not take title himself did not lessen the tendency of the contractual arrangement to invite him to increase his reward by inducing the government to pay a high price for the land. The difference created by this slight deviation in the structure of the arrangements did not alter their effect. The "vicious" tendency at which Congress hit was still present. The government was still obligated to pay the landowner's price—the land's cost plus a percentage to Mc-

[7] "There are two general classes of 'cost plus' contracts. One class is generally known as 'cost-plus-a-percentage' contracts and the other as 'cost-plus a fixed-fee' contracts. They are materially different. Under those in the first class the fee or profit of the contractor is made dependent on the cost of the work with the idea that the amount of the fee will automatically adjust itself to the variations in the cost of the work resulting from changing conditions and requirements during the life of the job. It is self evident that under this class of contract it is to the financial interest of the contractor to have the cost of work run high. Under the second class, the fee is not affected by variations in costs, but only by changes in the scope of the work. From this it follows that it is to the advantage of the contractor to accomplish the work at as low costs as possible." The Law of Government Contracts, Graske (1941) pp. 122-3.

[8] The Circuit Court of Appeals in discussing the general tendency of this system of contracting to increase costs to the government said: "The probability of that general result in the Weldon Springs transactions is, as we have indicated, quite cogently suggested (and indeed demonstrated) by the record."

Dowell of that cost. Furthermore, the effect, if any, of McDowell's not taking title himself, was to aggravate the government's peril, for McDowell did not take any risks of purchase. To hold that these arrangements are legal is to leave unchecked a system of government purchasing which Congress has declared to be incompatible with the public interest.

It is said that statutes providing for the renegotiation of war contracts indicate that in "certain instances the government seeks to recover abnormally high contract profits." These efforts of Congress to safeguard the public interest against unjust exactions provide no excuse for the narrow construction the Court today gives the "cost-plus-a-percentage-of-cost" prohibition. They but emphasize the intention of Congress to devise many safeguards against unfair procurement prices which might unjustly enrich some few people at the expense of the many. I should think that if these statutes could be given any effect, under the circumstances of these cases, they would but provide an added reason why the government should not be required to pay these landowners more than "just compensation." Certainly, in the light of the legislative policy articulated in the renegotiation statutes, I can see no reason why this Court should work overtime to shrink the scope of the cost-plus-a-percentage-of-cost statutory prohibition.

The Court's judgment in effect upholds McDowell's percentage agreement with the government and the option agreements with the landowners made pursuant thereto. It requires full payment not only of the stipulated land prices but of McDowell's commissions as well. This is so because the $4,500.00 and $12,000.00 included the cost of the land plus the percentage of that cost which was McDowell's commission. Thus, affirmance of the District Court judgments necessarily must imply that McDowell's commission agreements with the government are valid.

The landowners' rights are indissolubly intertwined with McDowell's.[9] Both must stand or fall together on the validity of McDowell's and the landowners' arrangements with the government. And under those arrangements the government was to pay

[9] The difficulty of an attempt to segregate McDowell's commissions from the land costs is indicated by the manner in which the Circuit Court of Appeals found he computed his commissions. It said that the option agreements included "commissions upon his own commissions, commissions upon the commissions of the Kansas City Title Insurance Company for closing the transactions, and commissions upon the amounts included in the contracts for revenue stamps and recording fees." What particular elements McDowell had fused into the real estate values recommended by him in any specific transaction were apparently not known to the Quartermaster Depart-

cost of the lands for which McDowell negotiated plus five percent of that cost. This was a "cost-plus-a-percentage of costs system of contracting." Such an integrated scheme of illegal arrangements should not be permitted to support these judgments. The government should be required to pay no more than just compensation for the lands it has condemned.[10]

Finally, I cannot agree to the Court's statement that this case comes to us "without any suggestion of fraud or unfairness such as would justify holding the contract invalid." The Court's opinion states that those who deal with the government must do so "with absolute honesty," and that "the doctrines of fraud, unconscionable dealing and unjust enrichment are to be strictly applied to insure fair and honest dealings between the government and its citizens." In my judgment, we are squarely confronted with the issues of fraud, unconscionable dealing, and unjust enrichment. I think we should remand the case to the Circuit Court so that it can pass upon those questions.

We are not faced here with a situation in which findings, upon "ample evidence", have been clearly made by a master and unequivocally and jointly affirmed by both a District Court and Circuit Court of Appeals—as in *United States* v. *Bethlehem Steel*

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ment at the time the contracts were approved." The Muschany's option agreement, in Case No. 31, which the government contracting officer marked "accepted"; did not show the amount of McDowell's commission; it showed only that the purchase price was $4500.00. There is neither finding nor evidence from which it can be determined what part of this purchase price, if any, represents McDowell's commission. In fact, petitioners strangely enough contend that there is no evidence to show that McDowell is to get any part of the $4500.00 as a commission. The same situation exists in No. 32.

[10] Were this contract not invalid as violating the Congressional prohibition against the cost plus a percentage of cost system, there would still remain the question as to whether the government was compelled to pay more than "just compensation" in these condemnation proceedings. We have never decided that there may not be circumstances short of those necessary to hold private contracts illegal, under which the government may, in condemnation proceedings, obtain judicial ascertainment of just compensation, despite a single contracting officer's agreement to pay more, and despite his attempted waiver of the Constitutional provision that the government need only pay "just compensation" for land it takes for public use. Danforth v. United States, 308 U. S. 271 actually decided quite different questions under a different statute, different pleadings and quite different circumstances. In condemnation proceedings, Danforth filed a counter claim seeking judgment against the government for a price stipulated in an agreement. The government attacked the counter claim and it was stricken in District Court on two grounds only: (1) the government had not consented to the suit; (2) the District Court was without jurisdiction because more than $10,000 was involved.

Co., 315 U. S. 289, 297-9.[11] The District Court and the Circuit Court of Appeals did not in the instant case, both concurrently find an absence of fraud, unconscionableness and unjust enrichment.

The District Court did state in its opinion that there was "no fraud", and that the option prices were "not unconscionable." This finding of the absence of fraud was, however, unsupported by the primary findings of fact made by it, and that court's conclusion rested upon legal assumptions which I think contrary to many decisions of this Court. The same is true of the finding of unconscionability. As to "unjust enrichment", the District Court made no finding at all, and I believe that its primary findings of fact are inconsistent with any holding that these landholders would not be "unjustly enriched" if the government is forced to pay the option prices.

The Circuit Court of Appeals found it unnecessary to pass upon either of these questions. It refused to indulge in what it termed a "judicial paring" of the cost-plus-a-percentage-of-cost statutory prohibition, and held the contracts void under that statute.

The District Court considered that the government's argument required it affirmatively to find the following three facts in order to hold that there was fraud: "(1) The agent's commission was added to the purchase price, (2) the price did not represent the reasonable market value of the land, and (3) McDowell misrepresented the value of the land to Col. Valliant."

As to the latter point, the District Court, in its opinion, stated that there was no misrepresentation by McDowell. The Circuit Court of Appeals did not affirm this finding. It did say that the record and findings of the trial court left no question "as to the actual good faith of the Quartermaster Department in the matter." But after narrating certain activities of McDowell, it observed that "These inconsistencies and disguising can hardly be commended as desirable methods of handling expenditures of public funds. The excuse made by the Quartermaster Department on the trial was its desire to get the job done as speedily as possible and 'because in one single voucher we could provide for the payment of a number of different services.' The result reached in the opinion requires no further pursuit here of these particular matters."

[11] Even if the Circuit Court of Appeals and the District Court had not passed upon these questions,—and I do not think they did—it does not necessarily follow that we would not review them. See City Bank Farmers Trust Company v. McGowan, No. 294, decided January 29, 1945, p. 5 of slip opinion; cf. City Bank Farmers Trust Company v. McGowan, 142 F. 2d 760, 801, and 48 F. Supp. 790, 795-6.

The Circuit Court's opinion, taken in its entirety, shows beyond doubt that it did not approve the District Court's findings as to McDowell's dealings.

The District Court further based its conclusion that there was no fraud, on a finding that the agent's commission was not added to the purchase price. This finding, the Circuit Court of Appeals expressly rejected. This Court has done likewise.

The third and last element which the District Court had posed concerning the presence of fraud was whether "the price did not represent the reasonable market value of the land." Neither the District Court nor the Circuit Court of Appeals found that the price did represent such a value. If such a holding has been made at all, it is by this Court, and I cannot agree to it. The District Court escaped the necessity of making a finding as to market value by holding that market value was immaterial, since "The circumstances of this case show that other considerations were in the minds of the parties when the option was taken. The necessity of national defense had flashed upon the country. The imminence of the peril was impressive. The land must be acquired at once, without the delay incident to condemnation. . . . The land was sought, but more was demanded; immediate possession was essential to its undertaking."

I can accept neither the court's conclusion, nor its reasoning. In the first place, this Court has long held "market value" to be the proper standard of value in eminent domain proceedings, and in considering market value, it has consistently been held that landowners are not entitled to increased amounts because the government announces that it needs property in a vicinity. *United States* v. *Miller*, 317 U. S. 369, 374, 376-377. Secondly, it is novel doctrine that when national peril requires the government to acquire property, the owners are as a matter of law entitled to get more than market value because more is "demanded." Furthermore, the court's assumption that the government was without power to get immediate possession of the land by condemnation proceedings was wholly erroneous. Declaration of Taking Act, 46 Stat. 1421.

Having thus put aside consideration of the fair or market value of the property the court limited itself to finding that the option prices did not represent an "unreasonably excessive value." What line marks the distinction between reasonable excess and unreasonable excess does not appear from the District Court's opinion nor from this Court's opinion today. An examination of the particular

facts in No. 31 suggests the difficulty of ever ascertaining what would be an unreasonably excessive value. In 1939, $800 back taxes had accumulated on 33 acres of land. The Muschanys bought it, paying the $800 taxes, $100 to the owners, and approximately $100 was allegedly expended for attorney's fee, abstract of title, etc. In 1940, the "necessity of national defense had flashed upon the country." The finding of the District Court, which was not approved by the Circuit Court of Appeals, is apparently approved by this Court today to the effect that 350% profit on this purchase of land is not "unreasonably excessive", even though the purchaser has held it for only one year. The only subsidiary finding of fact which the District Court made to support this phenomenal rise in value was that in 1937, a road had been built which shortened the distance to St. Louis by about 15 miles. But this road had been built two years before the Muschanys paid off the back taxes and took the property into their possession. The Court today, however, refers to certain other events which had occurred, and which are evidently relied upon as justifying this increase in value from $1,000 to $4,500 in the short span of a single year. It is clear that there was one reason, and one reason only, for the $4,500 price. That reason was that the government needed the land to help win the war and McDowell had a cost-plus-a-percentage-of-cost contract.

The Circuit Court of Appeals in discussing this question of value said, "There is, however, no occasion for us here to review either the government's or the landowner's evidence as to value in the two cases. If the value of the land were the issue to be determined, we might hesitate to reject the trial court's findings in either case, under Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Par. 723c. But the findings referred to are not determinative of the issue here being considered." The Circuit Court of Appeals then went to to decide the only question that it did decide, which was whether McDowell's contract with the government violated the cost-plus-a-percentage-of-cost statute.

At the very least, I think the government is entitled to have the Circuit Court of Appeals pass on the questions of fraud, unconscionability, and unjust enrichment which this Court says "are available whenever and wherever transgressions take place."

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.